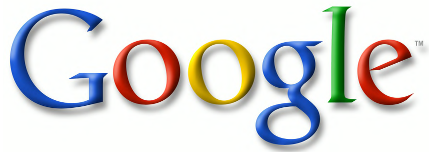

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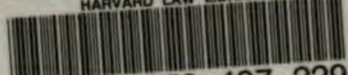
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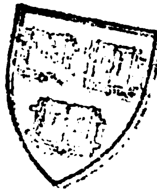

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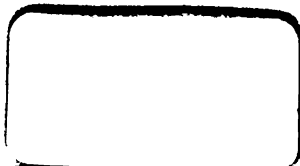

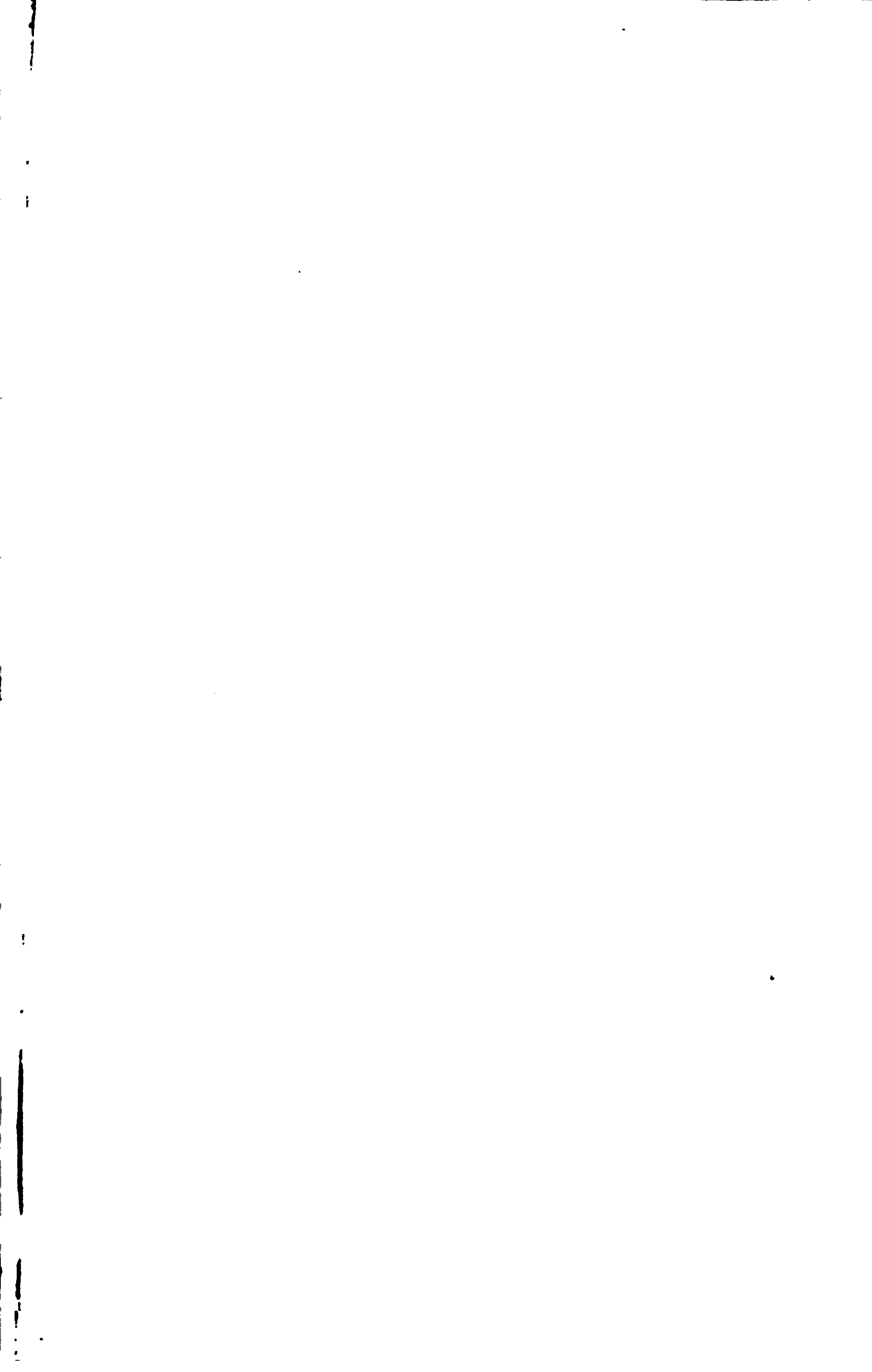

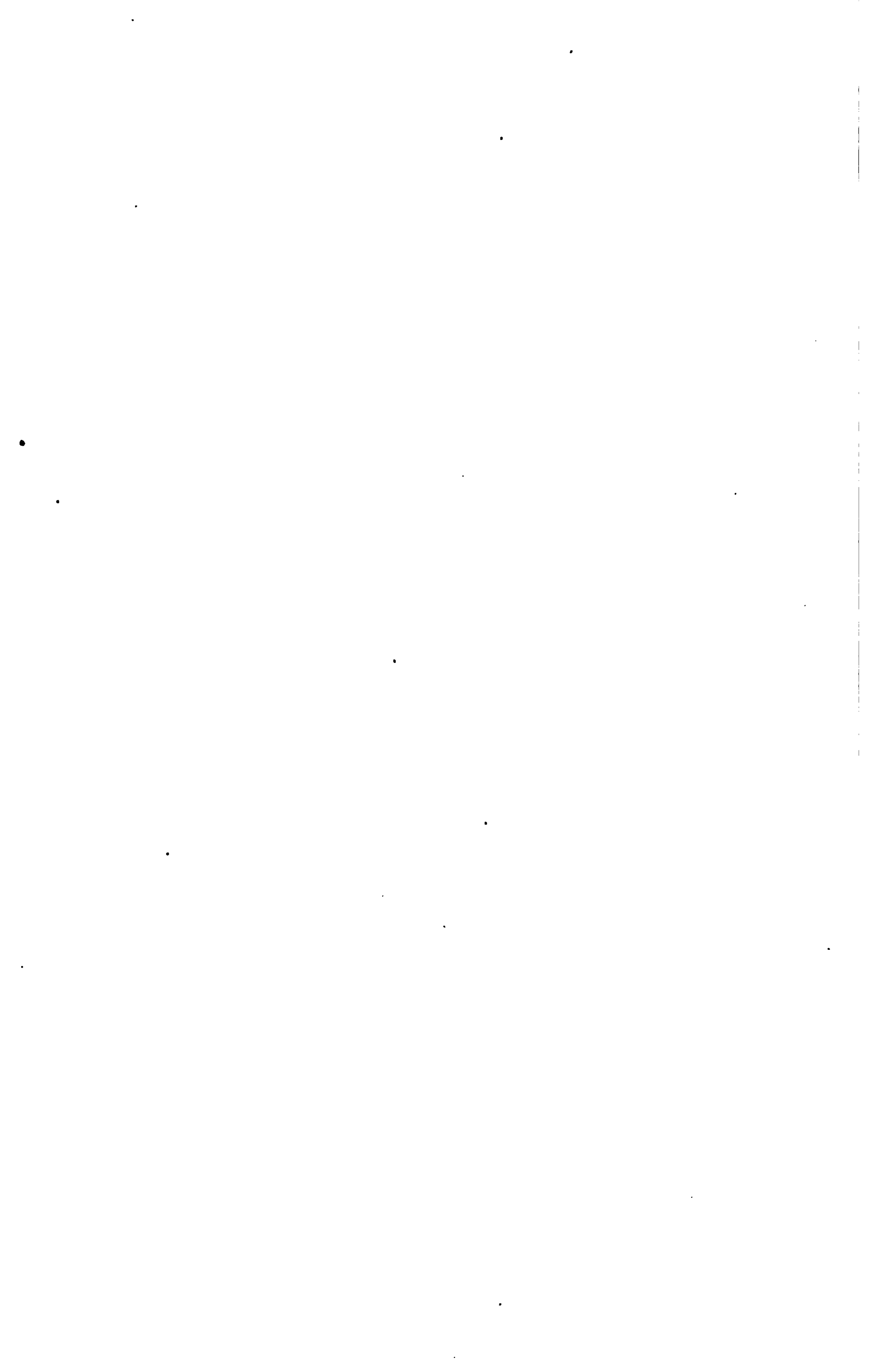

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

BY JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*‡
HON. ROBERT W. McBRIDE.§
HON. JOHN D. MILLER.||
HON. WALTER OLDS.†
HON. SILAS D. COFFEY.†

* Chief Justice at the November Term, 1891.
† Term of office commenced January 7th, 1889.
‡ Term of office commenced January 3d, 1887.
§ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.
|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

OFFICERS

OF THE

SUPREME COURT.

CLERK,

ANDREW M. SWEENEY.

SHERIFF,

JAMES L. YATER.

LIBRARIAN,

WILLIAM W. THORNTON.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1891, IN THE SEVENTY-SIXTH YEAR OF THE STATE.

No. 16,148.

HUTTS ET AL. *v.* MARTIN.

131 1
133 289

131 1
140 475
143 671

131 1
144 370
145 332

131 1
149 103
149 252
151 539

APPEAL.—*Notice to Co-Parties.—Supreme Court will Relieve Against Mistake.* —Where appellant's failure to give notice of the appeal to his co-party is due to accident or mistake, the appeal will not be dismissed, but an opportunity will be given to the appellant to correct his error.

From the Montgomery Circuit Court.

L. J. Coppage and *M. D. White*, for appellants.

H. H. Dochterman and *D. Simms*, for appellee.

ELLIOTT, C. J.—This action was instituted by John B. Martin against Mark O. Hutts, Henry P. Hutts, Milton Hutts, Joseph Hutts, Francis Hutts, Eliza Whittaker and William Whittaker. The trial court found that all of the defendants were in possession of the land to which Martin asserted a right, and that they claimed title adversely to him. The court found and adjudged that Martin was entitled to the land, and to recover possession. William Whittaker is not made a party to the appeal, but in the assignment of errors Elizabeth Whittaker is named as an appellant. The

appellee has filed a motion to dismiss the appeal, upon the ground that two of the defendants below and co-parties of the appellants are not made parties to the appeal.

The rule requiring notice to be given co-parties is not a technical one, but, on the contrary, is a rule of substance and importance. The presence of co-parties on appeal is essential to complete jurisdiction, so that the question of co-parties is one of a jurisdictional nature. Our statute concerning co-parties is explicit and mandatory, and neither the court nor the parties can disregard it. Section 635, R. S. 1881. Notice to co-parties is imperatively required. *Travellers Ins. Co.* v. *Yount*, 98 Ind. 454; *Concannon* v. *Noble*, 96 Ind. 326; *Shulties* v. *Keiser*, 95 Ind. 159; *Hunderlock* v. *Dundee, etc., Co.*, 88 Ind. 139.

The common-law rule respecting parties was more strict than that prescribed by our code. It is, however, not always true that parties to the record or parties to the action upon the same side are co-parties, for there may be a complete severance of interest by the judgment below, or the parties to the action or record may not be parties to the judgment.

In this instance Eliza Whittaker and William Whittaker are co-parties of the appellants, for the action is to recover possession of land, and the trial court found and adjudged that all who were defendants were in possession of the land asserting title adversely to the appellee, and among the defendants were William and Eliza Whittaker. As they were co-parties, the appellants should have given them notice as the law requires.

We have concluded that, although the appellants have not given their co-parties notice, the appeal ought not to be dismissed. This conclusion is asserted by us for the reason that the appellants have shown that the failure to make necessary parties was due to accident or to mistake of fact. The mistake as to Eliza Whittaker is simply in naming her Elizabeth Whittaker, and as to William Whittaker, the mistake is shown to have been caused by an error of the clerk of the

trial court in making out the transcript. We think it clear that an appellate court has the inherent power to relieve against accident and excusable mistake in the proper case. *Smythe* v. *Boswell*, 117 Ind. 365. If it were not for the mistake, the motion to dismiss the appeal should be sustained, inasmuch as all parties must be brought in within the time limited for appealing, unless accident, fraud or excusable mistake is affirmatively shown. *Holloran* v. *Midland R. W. Co.*, 129 Ind. 274.

Ordered that the motion to dismiss be overruled, that the costs of the motion be taxed against the appellants, and that they be allowed thirty days in which to correct their errors respecting parties.

Filed March 19, 1892.

No. 14,988.

BRICKLEY ET AL. v. EDWARDS ET AL.

131	3
140	5
131	3
144	70
131	3
166	423

PRACTICE.—*Non Est Factum.*—*Reply.*—*Plea of Estoppel.*—A plea of *non est factum* closes the issues, and does not require a reply; but a reply of estoppel may be pleaded to such an answer.

SAME.—*Motion to Strike Out Pleading.*—*Overruling.*—Overruling a motion to strike out a pleading is not such an error as will reverse the case.

PROMISSORY NOTE.—*Payable in Bank.*—*Note Executed by Illegal Corporation.*—The maker of a note, payable in bank, to an illegal corporation, which is afterwards annulled by a decree of court is, as against an innocent endorsee of the note for value, estopped to deny its existence or its capacity to contract.

ESTOPPEL.—*Third Person Relying Upon Correspondence not Addressed to Him.*—A. wrote to B., who had executed a note payable in bank, asking him "if the note was all right," and if it would "be paid at maturity?" B. replied on the back of the letter that "the note referred to is all right, and will be paid when due." The letter came into the possession of C., who purchased the note before it was due, relying upon the correspondence, and became assignee thereof.

Held, that B. was not estopped to set up any defence against said note that existed at the time of the correspondence as against C., the purchaser.

SAME.—*Special and General Admissions or Declarations.*—Admissions or dec-

larations which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced, whether the admissions or declarations are made in express language to the person himself, or are made in general terms, or may be implied from the open and general conduct of the party. Open and general statements of a party may be considered as addressed to everyone who may have occasion to act upon them.

From the Huntington Circuit Court.

L. P. Milligan and *O. W. Whitelock*, for appellants.

H. J. Shirk, *L. Walker*, *W. B. McClintic* and *J. Mitchell*, for appellees.

McBride, J.—The appellee was plaintiff below. His complaint charges the execution of a note by the appellant Andrew J. Brickley on January 25th, 1882, payable January 25th, 1887, to the Fort Wayne, Warren and Brazil Railroad Company, or order, at the First National Bank of Fort Wayne, Indiana, and, also, the execution by both appellants of a mortgage on certain land in Huntington county to secure the note.

It also alleges the assignment of the note and mortgage before maturity to the appellee. Prayer for judgment for the amount due on the note and for foreclosure of the mortgage.

The appellants filed an answer in eight paragraphs:

1st. A joint answer of general denial.

2d. A separate answer by Andrew J. Brickley of *non est factum*, verified.

3d. That the note and mortgage were procured by fraud, of which the appellee had full knowledge.

4th. That the note and mortgage were procured by fraud, and were without consideration, and, after they were signed, they were taken and carried away without his authority or consent, and that there was in fact no such corporation as that named as the payee.

5th. That the note and mortgage were obtained by fraud, and were without consideration, of which facts the assignee had full knowledge when he took the assignment.

6th. That the note and mortgage were without any consideration whatever, of which fact the appellee had full knowledge, etc.

7th. That the note was procured by fraud, that when it was given a suit was pending challenging the existence of the payee as a corporation, which suit was afterward prosecuted to effect, and a judgment rendered adjudging it no corporation, which judgment was, on appeal, affirmed by the Supreme Court, and that the appellee had knowledge of all of said facts when he took the assignment. This answer was verified.

8th. A verified denial of the assignment.

The appellee replied in six paragraphs.

The first is addressed to the second paragraph of answer, that of *non est factum*. It alleges that on the day the note was assigned to him one William J. Holman, claiming to be the President of the Fort Wayne, Warren and Brazil Railroad Company, presented to him a memorandum in writing directed to the appellant A. J. Brickley, making inquiry as to the validity of the note and mortgage, said inquiry being signed by E. H. Shirk; that on the opposite page thereof was a memorandum signed by said Brickley, stating that the note and mortgage referred to were "all right," and would be paid at maturity. The latter memorandum was addressed to "Hon. E. H. Shirk," writer of the letter of inquiry. It was further alleged that said writing had been intrusted to said Holman by said Brickley to enable Holman to negotiate the note; that the appellee relied on the representations in said writing, without other knowledge of the facts, and purchased the note for a valuable consideration and before maturity, whereby he claimed the appellant was estopped to deny the execution of the note.

The second paragraph of reply was addressed to the third and fourth paragraphs of answer, and alleged that the appellee purchased the note before maturity, in good faith, for a

valuable consideration, and without knowledge of any fraud in its procurement.

The third paragraph was addressed to the fifth and sixth paragraphs of answer, and denies knowledge of any want of consideration, and alleges that he purchased the note before maturity, in good faith and for a valuable consideration.

The fourth paragraph is addressed to the seventh paragraph of answer, and also alleges that the note was assigned to him before maturity, for value, etc., and that he had no knowledge of the action to annul the corporation, or of the fraud, or that the payee was not legally incorporated.

The fifth paragraph was addressed to all of the answers except the first and and second. The facts pleaded were substantially the same as in the first paragraph, setting out the letter to Shirk and the reply by Brickley.

The sixth was a general denial, addressed to all except the first, second and eighth paragraphs of answer.

The errors assigned, so far as they relate to the pleadings, are, that the court erred in overruling appellants' motion to strike out the first and fourth paragraphs of the reply, and in overruling appellants' demurrer to the second and fifth paragraphs of reply.

The ground upon which the appellants insist that the court erred in refusing to strike out the two paragraphs of reply, is that they were both addressed to pleas of *non est factum*, and that a plea of *non est factum* closes the issues, and does not admit of a reply. It is true that a plea of *non est factum* closes the issues, and does not *require* a reply. It does not follow, however, that a reply may not be proper. A reply of estoppel may be pleaded to an answer of *non est factum*. *Pattison* v. *Norris*, 29 Ind. 165; *Rudd* v. *Matthews*, 79 Ky. 479. *Webb* v. *Corbin*, 78 Ind. 403, is not in conflict with this. The court did not err in refusing to strike out the replies. But, if it had, the cause could not be reversed upon that ground. A cause will not be reversed because of the refusal of the court to strike out a pleading. *City of Craw-*

fordsville v. *Boots*, 76 Ind. 32; *Smith* v. *Martin*, 80 Ind. 260; *Lake Erie, etc., R. W. Co.* v. *Kinsey*, 87 Ind. 514; *Hoke* v. *Applegate*, 92 Ind. 570.

It is unnecessary for us to consider in this connection the sufficiency of the seventh paragraph of answer as a plea of *non est factum*. Nor did the motion to strike out raise any question as to the sufficiency of the reply of estoppel. A motion to strike out does not perform the office of a demurrer.

The court did not err in overruling the demurrer to the second paragraph of reply to the third and fourth paragraphs of answer. The averments of the fraud, by which it is alleged the execution of the note and mortgage were procured, are not sufficient to bring either of the paragraphs of answer within the rule of *Cline* v. *Guthrie*, 42 Ind. 227, upon which the appellant relies. It is not alleged that the appellant was deceived as to the character of the papers he executed. He knew he was making a note and a mortgage. Nor are the averments that they were taken away without his authority or consent sufficient to bring the facts pleaded within the rule of that case. Neither of the answers is verified. They do not call in question the execution of the note and mortgage, but seek to avoid them because of the alleged fraud of the parties who procured their execution, and the alleged knowledge of the appellee of the fraud. As against the payee or one chargeable with notice they plead a good defence. The note being payable at a bank in this State, none of the facts thus pleaded can avail against a *bona fide* endorsee for value who acquired it before due. So, also, of the averments of the non-existence of the corporation. Having contracted with it as a corporation he is, as against an innocent endorsee of the note, estopped to deny its existence, or its capacity to contract. *Smelser* v. *Wayne, etc., T. P. Co.*, 82 Ind. 417; *Jones* v. *Kokomo Building Ass'n*, 77 Ind. 340; *Beatty* v. *Bartholomew, etc., Society*, 76 Ind. 91; *Baker* v. *Neff*, 73 Ind. 68; *Snyder* v. *Studebaker*, 19 Ind.

462; *Meikel* v. *German, etc., Society*, 16 Ind. 181; *Heaston* v. *Cincinnati, etc., R. R. Co.*, 16 Ind. 275.

The fifth paragraph of reply was, as we have heretofore said, a reply of estoppel, and was pleaded to all of the several paragraphs of answer except the first and second. It was based upon the following writings:

"PERU, IND., April 1st, 1882.

"*Mr. Andrew J. Brickley, Markle, Ind.:*

"DEAR SIR: William J. Holman, of Fort Wayne, wishes to negotiate with us for a loan, or rather the sale of a note of yours for ($2,000) two thousand dollars, dated June 25th, 1882, payable to the Fort Wayne, Warren, and Brazil Railroad Company, maturing January 25th, 1887, and secured by mortgage of the same date of note, on one hundred acres of land, being a part of your home farm opposite the town of Markle, in Huntington county, Indiana, and recorded February 4th, 1882, in book S, page 297 of mortgage records of Huntington county. We wish to know if the note is all right, and will be paid at maturity, and interest as it becomes due. Please answer on opposite page and oblige.

"E. H. SHIRK."

Indorsed upon the back of the foregoing was the following:

"MARKLE, IND., April, 1882.

"*Hon. E. H. Shirk:*

"DEAR SIR: Yours on opposite page received. The note and mortgage referred to are all right, and will be paid when due. There are no other liens against the land mortgaged. A. J. BRICKLEY.

"Witness: W. J. HOLMAN.
"WILLIAM ALLEN.
"L. P. HOLMAN."

It is alleged in the reply that the holder of the note, Holman, offered it for sale to E. H. Shirk and the appellee, who were respectively president and assistant cashier of the First National Bank of Peru; that thereupon Shirk addressed the

foregoing letter to the appellant, who thereafter signed and delivered to Holman the reply for the purpose of aiding him in negotiating and selling the note and mortgage. It is not averred that Brickley had any knowledge of the relations existing between Shirk and the appellee, or of their connection with the bank, nor is it averred that Brickley had any knowledge of Holman's intention to try to sell the note and mortgage to the appellee, nor to any person other than to Shirk, nor is it averred that his purpose was to aid him generally in an effort to sell them, or to sell them to any person other than to Shirk. For some reason not disclosed by the pleading, Shirk did not take the note, but the appellee did, and insists that while the written statement of Brickley was addressed to Shirk, he was authorized to and did rely upon its statements when he purchased and took the assignment of the note, and that the appellant is thereby estopped to defend against him, either on the ground of fraud in the procurement of the note, or on the ground that he did not execute it. This claim appellee's counsel base on the ground that the statements that the note and mortgage were all right, and would be paid when due, were general statements, without qualification, not made confidentially, but delivered to a party who he knew was endeavoring to effect a sale of the note for the purpose of aiding him in the sale.

The rule relating to declarations of the character in question is correctly stated in an authority cited and quoted by counsel for the appellee thus: "A declaration made to one party can rarely operate as an estoppel in favor of another. Where, however, a declaration or admission is so general in its terms or made under such circumstances as to indicate that it was intended to reach or influence third persons, or the community at large, the estoppel will be carried so far as to protect every one who may be presumed to have acted on or been governed by it." 2 Smith Leading Cases, Star p. 799, note to Duchess of Kingston's case.

Admissions which have been acted upon by others are

conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. This is true whether the admission or declaration is made in express language to the person himself, or is made in general terms, or may be implied from the open and general conduct of the party. His open and general statements may be considered as addressed to every one who may have occasion to act upon them. 2 Greenleaf Ev., section 207. Does the statement addressed by the appellant to Shirk fall within this rule? We think it does not. Upon its face it is addressed to Shirk alone. It is in response to a personal letter addressed to him by Shirk. An examination of the authorities cited by the appellee will show that they do not support his contention.

Dickerson v. *Colgrove*, 100 U. S. 578, is cited as being similar to the case at bar. In that case the writer of a letter to one person is held to have estopped himself to claim any interest in certain land as against a third person to whom the contents of the letter had been communicated. An examination of the case discloses the fact that in the letter itself the writer expressly authorizes the communication of his disclaimer of any interest in the land to the third person, and that this was done and had been acted upon. Page 580.

Weyh v. *Boylan*, 85 N. Y. 394, is also cited. In that case the maker of a note and mortgage was held to be estopped to defend on the ground of usury against one who had purchased them, relying upon a certificate in some respects similar to that made by the appellant in this case. Instead, however, of being addressed to any particular person, or written in response to any special inquiry, it was a certificate, general in its terms, and addressed to no one. While it contained a statement that the writer knew of a contemplated assignment to certain persons, it also contained the general statement that "It will be good and valid in the hands of an assignee."

The note and mortgage were in fact assigned to the per-

sons named in the statement, and by them to the parties who sought to enforce it. While we think that case was correctly decided, we do not think it sustains appellee's claim in the case at bar. The cases of *Mitchell* v. *Reed*, 9 Cal. 204, and *Horn* v. *Cole*, 51 N. H. 287, are also cited. In our opinion neither of those cases was correctly decided, and we decline to recognize them as authority. In the first case, Mitchell was a merchant engaged in the sale of groceries and liquors. His business was conducted by a clerk, one Haskell. Mitchell was a Son of Temperance, and not wishing it known that he dealt in liquors, said that the liquors in the store belonged to Haskell, who sold them without his consent. This coming to the knowledge of a creditor of Haskell, he commenced attachment proceedings against Haskell, and Reed, a constable, seized the liquors as Haskell's. It was held that the public statements made by Mitchell estopped him to claim the liquors. It was not shown, however, that the creditor had given credit to Haskell upon the strength of his reputed ownership of the property, nor is it shown that he was in any manner influenced by Mitchell's statements, or knew of them until the time when he commenced the attachment proceedings.

The case of *Horn* v. *Cole*, *supra*, rests upon grounds equally untenable. It is, however, an interesting and instructive case, citing and reviewing a very large number of cases covering the general modern doctrine of estoppel *in pais*, and while we can not approve of the conclusion reached on the facts disclosed, we commend the learned and discriminating discussion of the cases cited.

As was said by the Supreme Court of Connecticut in *Kinney* v. *Whiton*, 44 Conn. 262 (26 Am. Rep. 462): "It seems to us to be an unsafe doctrine to adopt, that a person who gets at second-hand a declaration not intended for the public and not intended for him, may act upon it as safely as the person to whom the declaration was addressed, and for whom alone it was intended. Where the declaration was intended only

for the person to whom it was addressed the party making it has assumed no obligation to any other person."

In our opinion the appellee is not entitled to avail himself of the statements contained in the letter addressed to Shirk for the purpose of an estoppel *in pais* against the appellant. See, also, *Mayenborg* v. *Haynes*, 50 N. Y. 675; *Townsend Savings Bank* v. *Todd*, 47 Conn. 190.

The court erred in overruling the demurrer to the fifth paragraph of reply.

We think it unnecessary to consider or pass upon the remaining errors assigned and discussed by the appellant. They are such as may not and probably will not arise on another trial of the cause.

The appellee has assigned several cross-errors. Of these, only two are discussed. Through what was probably inadvertence, one of these presents no question for consideration. The court sustained a demurrer to the first paragraph of reply, which was addressed to the second paragraph of answer, and overruled a demurrer to the second paragraph of reply. We have considered that ruling on assignment of error by the appellant.

Counsel assign as cross-error that the court *sustained* a demurrer to the second paragraph of reply. In our opinion the court erred in sustaining the demurrer to the fourth paragraph of reply. This was pleaded to the verified seventh paragraph of answer. This paragraph of answer was evidently intended as a special plea of *non est factum*. The facts pleaded were not sufficient to negative the execution of the note, and it was not good as a plea of *non est factum*.

It was, however, a good plea in bar, but the replication to it was sufficient. It is unnecessary to state the reasons that lead us to this conclusion, further than to refer to what we have said as to the sufficiency of the second paragraph of reply.

Because of the errors of the court in overruling the demurrer to the fifth paragraph of reply, and in sustaining the

demurrer to the fourth paragraph, the cause is reversed, with instructions to the circuit court to grant a new trial, and to proceed in accordance with this opinion.

Filed March 17, 1892.

No. 15,379.

131	13
132	157
132	172
131	13
143	74
131	13
156	570
156	571

Miller *v.* Hardy et al.

Practice.—*Erroneously Sustaining Demurrer to Reply.—Special Findings of Fact Curing Error.*—Error occasioned by improperly sustaining a demurrer to a reply is cured if the special finding of facts show that the plaintiff was not deprived of putting his whole case into the record for review by the Supreme Court.

Bankruptcy.—*Foreclosure of Mortgage on Lands of Estate Pending Bankruptcy Proceedings.*—If suit be brought against a bankrupt, pending his proceedings in bankruptcy, to foreclose a mortgage upon land which he has assigned to his assignee in bankruptcy, and the assignee represents to the United States Court, in which the proceedings in bankruptcy are pending, that the lands ought to be abandoned because of no value to the estate in bankruptcy, and the court so orders, the foreclosure will be binding upon all who are parties to it.

Res Judicata.—*All Defences Must be Plead in Foreclosure Proceedings.*—In a foreclosure proceeding the defendant must set up all defences he is entitled to or he will be barred.

From the Montgomery Circuit Court.

G. D. Hurley and *M. E. Clodfelter*, for appellant.

H. H. Dochterman, *A. W. Caldwell* and *J. L. Caldwell*, for appellees.

Miller, J.—The appellant filed her complaint in four paragraphs, against the appellees. Demurrers were sustained to the second and third paragraphs, and these rulings are complained of in this court.

The first paragraph of complaint was in the ordinary form, authorized by the code, for the recovery of real estate, damages for its detention, and for rents and profits.

The second and third paragraphs are each for the recovery of the same tracts of land described in the first.

The appellant was entitled to introduce all the evidence under the first paragraph that would have been admissible under either the second or third, and the special finding of facts made by the court shows that she did, in fact, introduce evidence to establish the cause of action set forth in these paragraphs, and that the facts so proven are included in the facts found by the court.

The fourth paragraph of complaint sought a redemption of the same land from a sale on the foreclosure of a mortgage executed by the appellant and her husband to one Byrns, alleging, among other things, that the defendants, claiming under the mortgage sale, had, while in possession of the land, received rents and profits. To this paragraph one answer was filed claiming that such defendants, while in possession, had paid out and expended large sums of money for lasting and valuable improvements, and for other specified purposes, which were necessary to the preservation of the property.

A demurrer was overruled to this paragraph of answer, and this is assigned as error.

The court found specially the facts upon which the plaintiff predicated her right of recovery, and concluded and adjudged that she was not entitled to redeem. The appellant, therefore, was not barred by the ruling of the court upon this demurrer.

If the court had found that the appellant was entitled to redeem, and it had thus been found necessary to have an accounting of rents and profits on the one hand, and expenditures for necessary improvements on the other, a very different question would be presented.

Some objections are urged to another paragraph of answer which sets up title in the defendants, founded upon the foreclosure of a mortgage executed by the appellant and her husband. We are satisfied that the facts therein set forth

are well pleaded, and the other objections will be considered hereafter.

We do not consider it necessary to review the rulings of the court in sustaining demurrers to the paragraphs of reply, for the reason that we find that all the facts therein relied upon are fully set forth in the special finding of the facts made by the court, upon which finding conclusions of law were stated and excepted to by the appellant. It thus affirmatively appears that the appellant has not been deprived of the privilege of putting her whole case into the record for review by this court. Having excepted to the conclusions, she is entitled to a ruling upon them that will give her all the benefit to which the facts entitle her, and she is, therefore, not injured by the ruling of the court in sustaining demurrers to her replies, even if the rulings were erroneous. *State, ex rel.*, v. *Vogel*, 117 Ind. 188.

A synopsis of so much of the special findings as are necessary to present the legal questions involved is as follows:

The plaintiff, Elizabeth Miller, was, and had been for many years, the wife of one John M. Miller, who, on and prior to the 10th day of December, 1877, was the owner of three hundred and fifty-nine acres of real estate in Montgomery county.

At the September term, 1877, of the Montgomery Circuit Court, the plaintiff obtained a judgment against her husband for $13,348.84. Subsequently this land was levied upon and sold upon an execution on this judgment to the plaintiff for $3,055.20, and, the land not being redeemed, she obtained a sheriff's deed for the same on the 11th day of November, 1878, which deed was in due time recorded.

On the 10th day of December, 1877, John M. Miller was, upon the petition of two of his creditors, adjudged to be a bankrupt, and Henry C. Adams was duly appointed his assignee in bankruptcy. In April, 1878, Adams, as such assignee, filed his *ex parte* petition in the United States District Court for an order for the sale of the lands of the bankrupt,

to make assets for the payment of his debts. That afterwards an order was made by the court for the sale of the land, and it was, on the 8th day of April, 1878, sold to Granville M. Ballard, subject to existing liens, for the sum of $60, and the sale reported to and confirmed by the court. In September, 1889, Ballard sold and conveyed the land to the plaintiff, and at the same time assigned to her all his claims for rents and profits of the land accruing subsequent to his purchase. On the 31st day of May, 1878, Miller received his discharge in bankruptcy. That on the 26th day of August, 1876, Miller and wife executed a mortgage on the land to secure a loan of $5,000 to one Ainsworth H. Byrns. That on the 15th day of February, 1878, the debt for which the mortgage was executed being due and unpaid, Byrns filed his petition in the United States District Court asking for leave to proceed in the Montgomery Circuit Court against the assignee to foreclose his mortgage during the pendency of said proceedings in bankruptcy. That said assignee made on the back of said petition the following indorsement, to wit: "On account of the amount of encumbrance on the real estate, do not think anything can be made for general creditors, and recommend that no expense be incurred in defending; that the same be abandoned. HENRY C. ADAMS."

That afterwards the said district court, in pursuance of said petition and endorsement thereon, duly made and entered the following order and decree, to wit: "Ordered on the above petition the assignee to relinquish and abandon all the title to said real estate now vested in him by virtue of the deed of bankruptcy herein, provided said mortgagee releases said estate from further liability on account of said mortgage." That pursuant to this consent, and during the pendency of the proceedings in bankruptcy, Byrns instituted a suit in the Montgomery Circuit Court for the foreclosure of the mortgage, making the plaintiff, her husband and the assignee in bankruptcy, parties defendant. That afterward such proceedings were had in the cause as that a judgment for fore-

closure was duly entered upon default and the lands sold on the 6th day of April, 1878, to Byrns for $5,868.85 and a certificate of purchase issued to him by the sheriff, and, the land not having been redeemed, a sheriff's deed was, on the 8th day of April, 1879, duly executed to the holder of the certificate, and possession of the lands taken by the grantee; that Byrns never at any time filed any claim in the court of bankruptcy against the estate of John M. Miller on account of the indebtedness represented by this mortgage, or for any part of the same.

That prior to the commencement of this suit, and before she obtained the deed from Ballard, the plaintiff offered to redeem the real estate from Byrns by tendering to him the amount of the judgment, interests and costs in said foreclosure suit. That the offer was made after the year for redemption had expired, and in pursuance of a promise made by Byrns that he would accept the amount of said judgment, interest and costs and let her have the land.

Upon these facts the court stated the following conclusions of law:

(1) That the plaintiff is not entitled to recover possession of the land in controversy; (2) that the plaintiff is not entitled to redeem from the Byrns mortgage for the reason that the judgment foreclosing said mortgage is binding and conclusive upon all who were made parties to the foreclosure suit, and upon all persons claiming under them; (3) that the action is not based upon any promise or agreement to be permitted to redeem, and any such agreement which may have been made can not avail the plaintiff in this action; (4) that the defendants are entitled to recover their costs of and from the plaintiff.

We are satisfied that the court did not err in its conclusions of law.

It appears that the lands in controversy were, prior to the time when the appellant obtained her judgment and sheriff's

deed, and prior to the institution of the bankruptcy proceedings, under which she claims title, encumbered by a mortgage executed by herself and husband; that the mortgagors having failed to pay the mortgage debt, it was foreclosed, the land sold to those under whom the appellants claim title, and no redemption having been made, within the time allowed by law, a sheriff's deed was executed to the purchaser, and possession taken of the property.

No reason has been given, and we can conceive of none, why, if the proper parties were made and the foreclosure and sale regular, this would not give the appellees a good title to the land as against the mortgagors and all persons claiming title under them, or either of them, acquired subsequent to the execution of the mortgage.

The finding shows that the appellant, her husband, and his assignee, were before the court, and called upon to disclose any interest they might have in the property. Not having done so, if the court had jurisdiction of the subject-matter of the action, they are concluded by the decree. *Adair* v. *Mergentheim*, 114 Ind. 303; *Hoes* v. *Boyer*, 108 Ind. 494; *Craighead* v. *Dalton*, 105 Ind. 72; *Barton* v. *Anderson*, 104 Ind. 578.

The only objection much urged by the appellant to the forclosure proceedings is the claim that, inasmuch as John M. Miller had been adjudged a bankrupt, and an assignee appointed, the Montgomery Circuit Court was without jurisdiction to entertain the foreclosure proceedings.

We do not feel called upon to examine and pass upon the question of the effect of a judgment rendered by a State court in a proceeding to foreclose a mortgage, instituted during the pendency of bankruptcy proceedings without the consent of the court of bankruptcy, where the assignee was made a party, and, without questioning the jurisdiction of the court, suffers a judgment by default to be taken, for such is not the case before us.

It affirmatively appears that upon petition made to the

court, and upon the advice of the assignee, the court ordered the assignee to relinquish and abandon all claim to the real estate upon condition that the mortgagee release the estate from further liability. The Montgomery Circuit Court was a court of general jurisdiction, and when the assignee in bankruptcy relinquished the property to the encumbrancers, its jurisdiction to entertain the suit to foreclose was full and complete. *McHenry* v. *La Societe*, 95 U. S. 58; Jones Mort., section 1232, and cases cited.

We do not regard the filing of a release of the estate of Miller by Byrns as a condition precedent to the institution of his foreclosure suit.

The findings show that he did comply with the terms of the order. The beginning of his suit in foreclosure was of itself an acceptance of the conditions of the order, and was doubtless sufficient to have prevented his claiming a share of the assets in the hands of the court for any deficiency that might have existed after exhausting the mortgaged property.

The appellant was a party to the proceedings in foreclosure, and if there was any defect on the part of Byrns in complying with the order of the court, it was incumbent upon her to make the objection then or never; failing to do so she was concluded from questioning the jurisdiction of the court, whatever might be its effect on the assignee.

This disposes of all the questions to which our attention has been called by counsel for the appellant.

Judgment affirmed.

Filed Jan. 12, 1892; petition for a rehearing overruled March 19, 1892.

131 20
139 12
131 20
149 369
131 20
f153 152

No. 15,680.

Collins v. Cornwell et al.

Practice.—*Striking Out Exhibit.*—In order to present a question on a ruling striking out an exhibit to a complaint, the exhibit struck out must be brought into the record by bill of exceptions.

Mortgage.—*Reformation.*—*Mutual Mistake.*—Where a husband joins his wife in signing and acknowledging a mortgage on the wife's real estate, but, by mutual mistake, the husband's name is omitted from the conveying clause, the mortgagee is entitled to have the mortgage reformed.

From the Dearborn Circuit Court.

H. D. McMullen and *W. R. Johnston*, for appellant.

J. K. Thompson, for appellees.

Olds, J.—This was an action brought by the appellant, Marcus Collins, against the appellees, Mary Cornwell and Levi E. Cornwell, husband of the said Mary, for judgment on a note, and for the foreclosure of a mortgage securing the same.

Issues were joined and a trial had, resulting in a judgment in the appellant's favor upon the note; and the contention arises over the right to a foreclosure of the mortgage.

There was a motion made by the appellee Mary Cornwell to strike out the exhibit to the first paragraph of the complaint, which motion was sustained, and the ruling is assigned as error.

There is no question presented by this assignment. To have saved the question the exhibit struck out should have been brought into the record by bill of exceptions, and this was not done.

The next question presented arises on the ruling of the court in sustaining a demurrer to the second paragraph of the complaint asking for a reformation and foreclosure of the mortgage.

The mortgage is in the usual form, terminating as follows: "In witness whereof the mortgagors have hereunto set their hands and seals this 31st day of March, 1885,"—and is signed

by both Mary Cornwell and her husband, Levi E. Cornwell, and both of their names appear in the certificate of the notary public, he certifying that both appeared and acknowledged the execution of the mortgage. The paragraph of the complaint contains proper averments showing the agreement to loan to Mary Cornwell $800, she to execute her note secured by mortgage on the real estate to be executed by herself and her husband joining with her, and showing the name of the husband to have been omitted from the body or conveying part of the mortgage by mutual mistake.

The ruling of the circuit court was to the effect that the mortgage was void, for the reason that the husband did not in fact join in the mortgage, his name not appearing in the body of the mortgage, and that it could not be reformed, corrected and foreclosed; that the only right the wife has to encumber her real estate is given to her by statute, and that she can only convey by deed in which her husband joins. Section 5116, R. S. 1881. This section of the statute requires the husband to join in the execution of a deed or mortgage of the wife's real estate.

We are referred to some authorities by counsel for the appellees, to the effect that to convey a husband's or wife's interest in real estate the name must appear in the conveying clause; that the deed, to be a valid conveyance of the interest of the wife in the husband's land, or the husband's interest in the wife's land, it must appear that he or she joined in the conveying clause; that is to say, their names must appear in the conveying clause.

It is not necessary that we decide as to the sufficiency of the mortgage to convey title without reformation. The question presented is as to whether or not such a mortgage may be reformed so as to make it comply with the contract and to speak the truth. To join in a deed or mortgage means to join in the execution, which includes the making of the instrument. "The term (execute) is frequently used in law;

as, to execute a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract." 1 Bouvier Law Dict., p. 622.

"To execute a deed is to sign, seal and deliver it." See "Execute," 1 Rapalje & Lawrence Law Dict., p. 478.

In this instance it is apparent from the face of the mortgage that it was the intention for the husband to join with his wife in the execution of the mortgage. There could have been no other purpose in his signing and acknowledging the mortgage. He joins in the signing, acknowledging and in the delivery of the mortgage, but his name is omitted from the body of the mortgage. The facts alleged show that the appellant parted with his money on the belief that the mortgage was valid, and that the husband had joined with his wife. The husband had at least done part of the things necessary to constitute a joining with the wife. He had done all that required any affirmative action on his part—he signed and acknowledged the execution. The mortgage had been drafted by a third person, and, as alleged in the paragraph, it was through his mistake and inadvertence that the name of the husband was omitted from the body of the mortgage. That under the facts stated the mortgage can be reformed and foreclosed against Mrs. Cornwell and her husband we think there can be no doubt. It would be inequitable and unjust to allow them to take advantage of the omission and defeat a foreclosure of the mortgage on that account. That such errors may be corrected by application to a court of equity we think is well supported by the decisions of this court as well as other authorities. *Calton* v. *Lewis,* 119 Ind. 181, and authorities there cited.

The court erred in sustaining the demurrer to the second paragraph of the complaint.

Judgment reversed, at costs of appellees, with instructions to overrule the demurrer to the second paragraph of the complaint.

Filed March 30, 1892.

No. 15,606.

PALMERTON ET AL. *v.* HOOP.

131	23
134	427
131	23
137	131
138	372
131	23
141	179
141	676
131	23
150	451
131	23
154	379
156	522

PRACTICE.—*Sustaining Demurrer to Special Answer.—Facts Provable Under General Denial.*—It is not error to sustain a demurrer to a good affirmative paragraph of answer when all the allegations of facts contained in it can be proved under the general denial.

JUDGMENT.—*Void and Voidable.—When is.*—A judgment of a court of competent jurisdiction is not void unless the thing making it so is apparent upon the face of the record. If the infirmity do not so appear, the judgment may be voidable, but it is not void.

SAME.—*Fraud.—Judgment Obtained by, Binding on Parties.*—A judgment obtained by fraud is binding on the parties until set aside in some proceeding instituted for that purpose.

SAME.—*Death of Defendant Before Judgment Rendered.*—If a defendant has been served with process and then dies, a judgment thereafter rendered against him is not void nor open to collateral attack.

ADMINISTRATOR'S SALE.—*Voidable.—Five Years' Statute of Limitations.*—A party to a voidable sale of land by an administrator is barred by the five years' statute of limitations.

SAME.—*Estoppel.—Heir Receiving Proceeds of Voidable Sale.*—An heir of the decedent who receives and retains a part of the proceeds of an administrator's sale which is voidable by reason of some defect in the proceedings, is estopped to contest the validity of such sale.

SAME.—*Death of Heir After Notice and Before Sale.—No Second Notice.—Effect on Sale.*—If an heir of the decedent die after notice given him of the commencement by the administrator of proceedings to sell real estate to pay debts of the estate, and a sale thereafter takes place without any further notice (or any suggestion of the death of such heir), and is affirmed, such sale is valid, and the heirs of such heir can not attack its validity.

SAME.—*Fraud.—Death of Heir.—Failure to Give Second Notice.*—A. died and left five heirs. B., one of the heirs, took out letters of administration, procured an order to sell lands to pay debts, but died before sale. C. was appointed administrator *de bonis non*, and secretly sold the land to D. at its appraised value, but for less than half that E. offered for it, with the fraudulent design of putting the title to the land in the latter, and of cheating the heirs of A. and B. The heirs of B. were not made parties to the proceedings to sell, and had no notice thereof, and were minors. The sale was affirmed.

Held, that the sale was not void nor subject to collateral attack.

From the Shelby Circuit Court.

H. Dailey and *J. B. McFadden*, for appellants.
K. M. Hord and *E. K. Adams*, for appellee.

COFFEY, J.—The complaint in this cause consists of three paragraphs.

The first paragraph consists of the ordinary complaint for the recovery of the possession of real estate.

The second paragraph alleges that the appellants are the owners in fee, and entitled to the possession, of the three-fifths of the land described therein; that they are the heirs at law of Francis M. Palmerton, who died in the year 1872; that said Francis was the son and heir of Homer Palmerton, who died in the year 1870 seized in fee of the land described in the complaint, with other lands in Shelby county, one-fifth of which descended to the said Francis, subject to the payment of its portion of the debts of the said Homer; that the said Homer left four other heirs, two of whom conveyed to the said Francis and the appellant Margaret Van Dorn, who was at that time the wife of said Francis; that the said Francis took out letters of administration on the estate of Homer Palmerton, and procured an order of the proper probate court to sell said land for the payment of the debts due from said estate, but died before a sale was consummated; that David Smith was appointed administrator *de bonis non* of said estate, and sold the land to the appellee for the sum of twelve dollars per acre, when he was offered by another person, who was able, willing and ready to purchase the same at the sum of twenty-five dollars an acre; that the sale was made by Smith to the appellee without the knowledge or consent of the person offering twenty-five dollars an acre for the same, and without the knowledge or consent of the appellants, or either of them, and for the fraudulent purpose of putting the title in the appellee, and for the purpose of cheating and defrauding the appellants; that the appellee is now in the possession of the land under said purchase, and that he has no other title thereto, and that for more than ten years

last passed he has kept the appellants out of possession of said land.

The third paragraph is, in legal effect, the same as the second, except that it alleges, in addition, that Smith, the administrator, and the appellee conspired together to sell the land to the appellee for less than one-half its value.

Each of the paragraphs of the complaint prays for possession of the land and damages for its detention.

The appellee answered:

First. The general denial.

Third. To the second and third paragraphs of the complaint the five years' statute of limitations.

Fourth. To the first paragraph of the complaint the five years' statute of limitations, averring that the appellee holds the land under an administrator's sale.

Fifth. Estoppel; alleging that a part of the purchase-money paid for the land at administrator's sale was received by the adult heirs of Francis M. Palmerton and a part by the guardian of his infant heirs; that the infants have since become of age, and settled with their guardian, and have received their portion of said money; that all the appellants still hold the purchase-money for said land so received by them.

The appellee also filed a cross-complaint setting up title in himself and asking to quiet his title. He also filed a claim under the occupying claimant's act.

A number of affirmative answers were filed by the appellants to the cross-complaint of the appellee, to which the court sustained a demurrer.

The appellants Francis M. and Emma M. Palmerton filed a separate reply, consisting of five paragraphs, the first being a general denial.

The second is addressed to the third paragraph of the answer, and admits the purchase by the appellee at administrator's sale, but alleges that they were not parties to the proceeding which resulted in the order for the sale, and had no

notice thereof, and that they had no notice of the fraud set up in the complaint until a few days prior to the commencement of the suit.

The third paragraph of the reply is addressed to the fourth paragraph of the answer, and alleges that they were not parties to the proceeding resulting in the order to sell the land, and had no notice thereof; that at the time the petition for the sale of the land was filed they were minors, under the age of twenty-one years, and that they are yet under the age of twenty-one years; that they had no notice of the fraud alleged in the complaint until a short time before the commencement of this suit.

The fourth paragraph of the reply is addressed to the fifth paragraph of the answer, and alleges that the order to sell the land was obtained by Francis M. Palmerton, and that he died before the sale was consummated; that Smith was appointed administrator *de bonis non*, and procured an order for reappraisement of the land, and to sell at private sale, without any notice of his application therefor; that he procured the order in the year 1874, and in the year 1875 sold the land to the appellee for its full appraised value, but for less than one-half of its actual value, when he was offered more than double the sum paid by the appellee; that the appellee was one of the appraisers who reappraised the land.

The fifth paragraph of the reply is addressed to the third, fourth, fifth and sixth paragraphs of the answer, and alleges substantially the same facts set up in the second and third paragraphs of the complaint, and, in addition thereto, that the appellants Francis M. and Emma M. Palmerton are yet minors under the age of twenty years; that Smith, as administrator, procured a reappraisement of the land, and an order to sell at private sale, without giving any notice of his application therefor, and that appellee was one of the appraisers who reappraised the land, and that the appellants did not discover the fraud alleged in the complaint until the year 1888.

The appellants also filed a joint reply consisting of five paragraphs, which do not differ materially in legal effect from the separate replies filed by the appellants Francis M. and Emma M. Palmerton, above set forth.

The court sustained a demurrer to each of the several affirmative replies; and the appellants, electing to stand on these pleadings, withdrew the general denials, and the appellee had judgment for costs.

No question is made in this court as to the sufficiency of the complaint, or as to the sufficiency of the answers above referred to. It is urged, however, that the circuit court erred in sustaining demurrers to the affirmative answers to the appellee's cross-complaint and to the affirmative replies.

No available error was committed by the circuit court in sustaining a demurrer to the affirmative answers of the appellants to the cross-complaint of the appellee to quiet title, as all defences thereto were admissible under the general denial which was pleaded.

Webster v. *Bebinger*, 70 Ind. 9; *Over* v. *Shannon*, 75 Ind. 352; *East* v. *Peden*, 108 Ind. 92; section 1055, R. S. 1881.

Each paragraph of the complaint in this cause proceeds upon the theory that the sale of the land in controversy by the administrator of the estate of Homer Palmerton was absolutely void.

In other words, each paragraph of the complaint is to recover the possession of the land and damages for its detention upon the assumption that the title of the appellants has never been divested. Upon this theory the appellants must recover, if they recover at all, in this action. In all pleadings subsequent to the complaint it appears that an order was made, upon proper petition, by a court of competent jurisdiction, with the proper parties before the court, to sell the land for the payment of the debts due from the estate of Homer Palmerton; that a sale was made, the purchase-price paid, the sale reported to the court and approved, and a deed made by the administrator and approved by the court.

It remains, therefore, to inquire whether the matters relied on by the appellants rendered the sale void.

It is contended by the appellants that the sale was void, for the reason :

First. That there was a fraudulent conspiracy and combination between the administrator and the appellee to transfer the title to the land for much less than its value.

Second. For the reason that the appellants were not parties to the proceedings to sell the land, and had no notice thereof, and are not, therefore, bound by the orders and judgments of the court.

The fraud alleged in the complaint did not render the judgment of the court confirming the sale void. A judgment of a court of competent jurisdiction is not void, in a legal sense, unless the thing making it so is apparent upon the face of the record.

If the infirmity do not so appear the judgment may be voidable, but it is not void. *Earle* v. *Earle*, 91 Ind. 27.

A judgment obtained by fraud is binding on the parties until set aside in some proceeding instituted for that purpose. *Weiss* v. *Guerineau*, 109 Ind. 438.

As we understand the pleading before us, it is not claimed that the appellant Mrs. Van Dorn was not a party to the proceeding resulting in an order to sell the land. The claim is, as we understand it, that after the death of Francis M. Palmerton, the former administrator, and the appointment of Smith as administrator *de bonis non*, the heirs of the said Francis, to whom three-fifths of the land descended, were not made parties to the subsequent proceedings resulting in a sale and conveyance of the land to the appellee.

By an act of the General Assembly, approved February 23d, 1855 (R. S. 1876, p. 525), in force at the time the sale in question was made, Smith, the administrator *de bonis non*, was authorized to sell the land on the order procured by his predecessor in the trust.

By the death of Francis M. Palmerton Mrs. Van Dorn,

who was then his wife, became the owner of two-fifths of the land in dispute as the survivor of her husband. She also became the owner of one-third of one-fifth as his widow. As she was a party to the proceeding, she is bound by all that was done in the case, and is barred by the five years' statute of limitations. She is also estopped from claiming the land by reason of accepting and still retaining a part of the price for which it was sold. She can not have both the land and the purchase-price. *Jennings* v. *Kee*, 5 Ind. 257; *State, ex rel.*, v. *Stanley*, 14 Ind. 409; *Dequindre* v. *Williams*, 31 Ind. 444; *Terre Haute, etc., R. R. Co.* v. *Norman*, 22 Ind. 63; *Webster* v. *Bebinger, supra; Bumb* v. *Gard*, 107 Ind. 575.

It follows that the joint replies of herself and the other appellants were bad, and the court did not err in sustaining the demurrer thereto.

It remains to inquire whether the failure to make the other appellees, who are the minor children of Francis M. Palmerton, parties to the proceeding, after his death and before confirmation of the sale, renders the sale, as to them, void.

There is no question made as to the fact that the court had jurisdiction of Francis M. Palmerton, their father, at the time of his death. When the land descended to them they took it, therefore, subject to the order previously made by the court to sell it. All that remained to be done was to sell the land, report the sale to the court, procure its confirmation, and execute a deed to the purchaser.

The fact that Francis M. Palmerton died did not deprive the court of jurisdiction to render a judgment of confirmation.

Black on Judgments, section 200, says: "The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons, during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, *not void* nor open to collateral attack." This doctrine seems to be fully sustained by the authorities cited

by Mr. Black in its support. See, also, Freeman Judgments, sections 140–153.

Where it appears upon the face of the record that a party against whom judgment is rendered was dead at the date of the judgment, Mr. Freeman, section 153, *supra*, says: "Even in such cases the judgment is simply erroneous, but not void. This is because the court, having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde.*"

Following these authorities, we are constrained to hold that the judgment of the court confirming the sale made by Smith, administrator *de bonis non*, to the appellee is not void, and is not subject to a collateral attack like this. In the matter of a collateral attack on a judgment a minor stands in no better situation than an adult.

It follows that the court did not err in sustaining the demurrer of the appellee to the several affirmative replies of the appellants Francis M. and Emma M. Palmerton.

Judgment affirmed.

Filed March 29, 1892.

No. 15,559.

181 30
154 331
131 30
163 364

The Chicago, St. Louis and Pittsburgh Railroad Company v. Williams.

Railroad.—*Setting Out Fire on Right of Way.—Sufficiency of Complaint.*— For a complaint held sufficient in an action against a railroad company for burning plaintiff's property, see opinion.

Same.—*Evidence.*—In such action the evidence tended to show that on the defendant's right of way, at the point where it was claimed the fire started, dry grass and weeds, both standing and cut, lying in swaths

extended up close to the line of the rails; that passing locomotives frequently dropped coals of fire which sometimes set fire to the ties; that the weather was dry, and the wind was blowing in a direction which would carry fire toward the plaintiff's land, and that a line of fire extended from that point to plaintiff's land.

Held, that the evidence was sufficient to sustain a verdict for plaintiff.

SAME.—*Negligence.*—*Proximate Cause.*—Where the evidence shows that other lands intervened between the right of way, where the fire originated and the plaintiff's land, over which said other lands the fire burned before reaching his land, and that it burned several days before it was finally subdued, being partially subdued several times, and again breaking out, defendant is not relieved from liability on the ground that its negligence was not the proximate cause of the injury. *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16, disapproved in part.

DEMURRER TO EVIDENCE.—*Practice.*—Where there is a demurrer to evidence the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the party demurring, to draw from the evidence all such reasonable inferences as a jury might draw. If there is a conflict in the evidence, then only such evidence as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn.

From the Blackford Circuit Court.

N. O. Ross and *G. E. Ross*, for appellant.

G. W. Steele and *J. A. Kersey*, for appellee.

MCBRIDE, J.—Two errors are assigned: 1st. That the court erred in overruling the appellant's demurrer to the complaint, and, 2d. That the court erred in overruling the appellant's demurrer to the evidence.

The complaint is as follows:

"James R. Williams *v.* The Chicago, St. Louis and Pittsburgh Railroad Company. The plaintiff complains of the defendant and says he is the owner in fee of the following described land in said Blackford county, Indiana, to wit: The west half of the southeast quarter of section 17, township 28, range 11, and the southwest quarter of the northwest quarter of said section 17, township 23, range 11, containing 120 acres; and that he has so owned the same and all the improvements thereon and appurtenances thereto for

more than ten years last passed; and that on the 6th day of November, 1887, there were 640 rods of fence worth $500, and twenty acres of meadow worth $100, and a barn and building connected therewith worth $50, on said land, and one strawstack worth $50, also hay worth $5, all reasonably worth $1,000, exclusive of the value of said land. And at said date defendant was engaged in running and operating her railroad in the vicinity of said land, and in so doing negligently scattered fire upon her right of way upon her track of her said railroad, which ignited and burned rubbish, grass, weeds and combustible material, which defendant had negligently allowed to accumulate and be on and along her said track on her said right of way, and said fire was by the defendant negligently permitted to spread to and burn and destroy plaintiff's said fences, meadows, barn and out-buildings and property, without any fault or neglect on the part of the plaintiff, and to his damage $1,000, which is due and unpaid, and for which he prays judgment and for all proper relief. STEELE & KERSEY,

"Attorneys for Plaintiff."

The specific objections urged to the complaint are: 1st. That the averments of ownership of the property destroyed are insufficient, and, 2d. That the allegations as to the spread of the fire, and destruction of the property, are not sufficient; that the complaint does not charge that the fire reached and destroyed the property by a continuous burning.

In our opinion the complaint states a good cause of action. The rule of practice on demurrer to evidence is so well settled by repeated decisions of this court that it is unnecessary to encumber this opinion with any extended statement, quotation or citation.

We will content ourselves by quoting the rule as stated in one of the later cases:

"*First.* The court is bound to accept as true all the facts which the evidence tends to prove, and, as against the party

demurring, to draw from the evidence all such reasonable inferences as a jury might draw. * * *

"*Second.* If there is a conflict in the evidence, then only such evidence as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn." *Palmer* v. *Chicago, etc., R. R. Co.* 112 Ind. 250.

Numerous cases are cited. The case of *Lake Shore, etc., R. W. Co.* v. *Foster,* 104 Ind. 293, is to the same effect.

There was evidence tending to show that on the appellant's right of way, at the point where it was claimed the fire started, dry grass and weeds, both standing and cut, lying in swaths, extended up close to the line of the rails; that locomotives, drawing trains of cars, passed there every day, and frequently dropped coals of fire, which sometimes set fire to the ties; that when the fire complained of started, the weather was dry, and the wind was blowing in a direction which would carry fire toward the appellee's land, and that a line of fire, or a "burnt district," extended from that point to the appellee's land.

We think a jury might, from this evidence, have found the existence of such facts, and have reasonably drawn such inferences as would have sustained a verdict in favor of the appellee.

We think, under the rule, that it might reasonably be inferred that the fire did originate on the appellant's right of way from fire dropped by its locomotives. We do not think the evidence would justify the inference that it escaped from the locomotives through negligence, but that it might reasonably be inferred that it was communicated to the weeds and grass on the right of way because of appellant's negligence in allowing such an accumulation of combustible matter in such close proximity to the line of its track, and that it escaped from the right of way because of the same act of negligence.

The evidence showed that other lands intervened between the right of way and the appellee's farm, over which the fire burned before reaching his land, and that it burned several days before it was finally subdued, being partially subdued several times, and again breaking out. From this counsel for the appellant argue that, conceding that the fire originated on its right of way, it was not the proximate cause of the injury, but was too remote to give rise to liability. *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16, is cited as supporting this contention. The conclusion reached by the court in that case was perhaps right upon the facts then before the court, and the case therefore correctly decided.

In so far, however, as that case may seem to assert the doctrine that when a fire, which has originated through actionable negligence or wrong-doing, is by the agency of the wind carried to and injures other property, the wind is an independent and intervening agency, which absolves the wrong-doer from liability, it is in conflict with the great weight of authority and is disapproved.

There may be cases when the wind, if of quite unusual and not to be expected violence, should be thus considered, as in case of a tornado.

This, however, we merely suggest, but do not decide, as there is nothing in the facts before us to indicate that the winds which carried the fire onto the land of the appellee were other than the ordinary winds common to that locality at that season of the year.

The recent case of *Louisville, etc., R. W. Co.* v. *Nitsche*, 126 Ind. 229, was, in many of its features quite analogous to this, and the principles involved were thoroughly considered in an opinion citing and reviewing the authorities. In our opinion the circuit court committed no error.

Judgment affirmed, with costs.

Filed March 19, 1892.

No. 15,641.

MURRER *v.* THE SECURITY COMPANY ET AL.

SUMMONS.—*Service of.*—*Return of Sheriff.*—*To what Credit Entitled.*—The return of the sheriff endorsed on a summons, showing that it had been duly and regularly served, is evidence of a high grade, and abundantly sufficient of itself to sustain a finding and judgment of the court that there was proper service of the summons.

From the Hancock Circuit Court.

J. A. New and *A. M. New*, for appellant.

C. L. Henry, *H. C. Ryan*, *F. A. Walker*, *E. Marsh* and *W. W. Cook*, for appellee.

MILLER, J.—The appellant brought this action in the court below to set aside a default and judgment for the foreclosure of a mortgage rendered in favor of the Security Company.

The complaint shows that, upon the filing of the complaint in the original action, a summons issued to the sheriff of Hamilton county for the appellant. On the same day the sheriff returned the summons, showing service on the appellant and her husband "by reading the same to and in their hearing" on that day. In due course a decree of foreclosure was entered against appellant, and subsequently the mortgaged premises were sold upon the decree, and bid in by the judgment plaintiff. Shortly before the expiration of the year for redemption, the certificate of purchase was sold and assigned to Martha M. Hall, who obtained and holds a sheriff's deed for the premises.

The complaint avers that a portion of the premises was owned by the appellant and her husband as tenants by entireties, and not subject to mortgage for the debt of the husband.

The action was brought under section 396, R. S. 1881, which, among other things, provides that "The court may also, in its discretion, allow a party to file his pleadings

after the time limited therefor, and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years."

The complaint alleges "that said default, judgment and decree were taken through her inadvertence, mistake, surprise and excusable neglect in this, to wit: That no summons was ever served on her in said cause notifying her of the pendency of said suit, and that she never had any notice, knowledge or information whatever that said suit had been brought, or was pending against her, until long after said judgment and decree were rendered, and said real estate was sold by the sheriff on said decree and execution."

The appellees answered the complaint by general denial; the cause was tried and a finding made by the court in favor of the defendants.

The error assigned in this court is the action of the court in overruling the plaintiff's motion for a new trial.

The question of fact, upon which the parties joined issue, was as to the service of the summons.

The plaintiff, to sustain her complaint, introduced evidence strongly tending to show that no summons was ever served upon her. To meet this, the defendants introduced in evidence the original summons and the return endorsed upon it, showing that it had been duly and regularly served. Also the deputy sheriff who, it was claimed, had served the summons, was placed upon the stand and testified that he made the service as endorsed on the writ.

This made a conflict in the evidence.

The rule that this court will not weigh evidence applies to this class of cases: *Williams* v. *Grooms*, 122 Ind. 391; *Dobbins* v. *McNamara*, 113 Ind. 54; *Nash* v. *Cars*, 92 Ind. 216; *Buck* v. *Havens*, 40 Ind. 221.

The return of the sheriff, endorsed on the summons, was evidence of a high grade, abundantly sufficient of itself to

sustain the finding and judgment of the court. In addition to the return we have the evidence of the officer who served the summons, tending to sustain the truthfulness of the return. If it be permitted to impeach the return of a sheriff for the purpose of setting aside a default, especially after the default has been followed by a judgment, and sheriff's sale, it should only be done by clear and satisfactory proof.

Judgment affirmed.

Filed March 30, 1892.

No. 15,595.

Lewis et al. v. Rowland.

131	37
144	209
131	37
170	137

Pleading.—*Supplemental Complaint.—Demurrer.*—A demurrer will not lie to a supplemental complaint.

Practice.—*Conflict of Evidence.*—If the evidence, though conflicting, tends to sustain the finding, the finding will not be disturbed.

From the Fountain Circuit Court.

S. F. Wood, *O. P. Lewis*, *J. A. Lindley*, *V. E. Levengood* and *H. H. Dochterman*, for appellants.

T. F. Davidson, for appellee.

McBride, J.—Two errors are assigned, as follows:

"1st. The court erred in overruling the demurrer to the supplemental complaint.

"2d. The court erred in overruling the motion for a new trial."

The first presents no question for our consideration. A demurrer will not lie to a supplemental complaint. A supplemental complaint is not an independent pleading, but is a mere supplement, or addition, to the original complaint, the two together constituting the complaint. *Morey* v. *Ball*, 90 Ind. 450; *Derry* v. *Derry*, 98 Ind. 319; *Farris* v. *Jones*, 112 Ind. 498; *Peters* v. *Banta*, 120 Ind. 416.

The second error assigned, as argued, presents no question but that of the sufficiency of the evidence to sustain the finding of the court. The evidence is conflicting, but there is abundance of evidence tending to sustain the finding, and we can not disregard it.

Judgment affirmed.

Filed March 30, 1892.

No. 15,610.

131 38
151 598
131 38
171 600

THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY v. ADAMS.

PLEADING.—*Action to Recover for Injuries.—Averment of Freedom from Fault.* —In an action to recover for injuries, the general averment that the plaintiff was free from fault will be overcome only when the specific facts stated by the plaintiff show contributory negligence.

VERDICT.—*General.—Answers to Interrogatories.—Irreconcilable Conflict.*—All fair intendments will be made in favor of the general verdict, and answers to interrogatories can not prevail against it, unless they are in irreconcilable conflict with it. For analysis of evidence showing that there is not an irreconcilable conflict between the general verdict and answers to interrogatories, see opinion. *Chicago, etc., R. W. Co.* v. *Hedges*, 118 Ind. 5, distinguished.

From the Tipton Circuit Court.

S. O. Bayless, C. G. Guenther and *C. Brown*, for appellant.

J. O. Brien, J. C. Blacklidge, C. C. Shirley, B. C. Moon and *C. Wolfe*, for appellee.

ELLIOTT, C. J.—The appellee seeks to recover for injuries which he received in crossing the appellant's track. His complaint shows negligence on the part of the appellant, and contains the usual general averment asserting that he was free from fault. There is no strength in the appellant's contention that, as the particular facts stated show contributory

negligence, the general allegation must be regarded as ineffective. The particular facts are far from showing contributory negligence, and as it is only where the specific facts clearly show negligence on the part of the plaintiff that they overcome the general averment the contention of the appellant must fail. *Ohio, etc., R. W. Co.* v. *Walker*, 113 Ind. 196.

As a general verdict covers the entire case and answers to interrogatories state only specific facts, it is no more than reasonable to hold, as it has often been held, that all fair intendments will be made in favor of the general verdict, and that answers to interrogatories can not prevail against it unless they are in irreconcilable conflict with it. *Town of Poseyville* v. *Lewis*, 126 Ind. 80, and cases cited. If, therefore, there is no irreconcilable conflict between the general verdict and the answers to interrogatories in this case, the former must stand. There is no such conflict. The answers to the interrogatories show that the plaintiff was familiar with the crossing; that he had passed over it on the morning of the day on which he was injured; that he was injured at night; that on account of the dense darkness he could not see the train; that the train was behind time and running very rapidly, and that no signals were given. The jury, in answer to several of the interrogatories, find that at the distance mentioned in such interrogatories, respectively, the plaintiff could not have seen the approaching train, but they do answer that he could have seen it when within a distance of eighteen feet. In other answers, however, they say that there were obstacles which would have prevented the plaintiff from having seen the train had he been looking in the direction from which it was approaching. It is to be observed that there is nothing in the answers which tends to show the plaintiff was not driving slowly, and looking and listening carefully, and hence it must be presumed, in support of the general verdict, that he was doing so. It is to be further observed that there is no finding that he did see the train when eighteen feet distant from the track, although

there is a finding that he could have seen it had he been looking in the direction from which it was approaching; and, for anything that appears, he may not have seen it, because looking in the opposite direction, or because of the obstacles mentioned in some of the answers. Contradictory answers can not be made to override the general verdict. We are not inclined to extend the doctrine of the case of *Chicago, etc., R. W. Co.* v. *Hedges*, 118 Ind. 5, and we do not think this case falls within the rule there declared, inasmuch as there is an essential difference in the facts exhibited in the answers returned in that case and those contained in the answers in the present case. The conclusion we here declare is in harmony with the decision in *Terre Haute, etc., R. R. Co.* v. *Clark*, 73 Ind. 168.

Judgment affirmed.

Filed March 29, 1892.

No. 15,295.

DEUEL v. NEWLIN.

131 40
148 115

PROMISSORY NOTE.—*Payable in Bank.—Transfer to Plaintiff Without Consideration.—Answer.—Sufficiency of.*—In an action upon a promissory note payable at a bank in this State, when it is averred in the complaint that it was transferred before due, for value, and was taken by the plaintiff in good faith, etc., an answer is good which avers that the note was, and at all times had been, the property of the payee; that the plaintiff had no actual interest in it, and that it was transferred to him without consideration, for purposes of collection only, and to prevent the defendant pleading as a set-off against it certain indebtedness due to him from the payee.

From the Noble Circuit Court.

L. W. Welker, for appellant.

R. P. Barr, for appellee.

MCBRIDE, J.—Suit by the appellant to collect a note and

foreclose a mortgage given by the appellee to one Hall, and by Hall assigned to the appellant. The note was payable at a bank in this State, and it was averred that it was transferred before due, for value, and was taken by the appellant in good faith, etc.

The second paragraph of answer averred, in substance, that the note was, and at all times had been, the property of the payee; that the appellant had no actual interest in it, and that it was transferred to him without consideration, for purposes of collection only, and to prevent the appellee pleading as a set-off against it certain indebtedness due to him from the payee.

A demurrer to this paragraph of answer was overruled, and this ruling is assigned as error. The answer is clearly good. *Bostwick* v. *Bryant*, 113 Ind. 448; *State, ex rel.*, v. *Ruhlman*, 111 Ind. 17; *Pixley* v. *Van Nostern*, 100 Ind. 34; *Curtis* v. *Gooding*, 99 Ind. 45; *Wilson* v. *Clark*, 11 Ind. 385; *Hereth* v. *Smith*, 33 Ind. 514; *Lewis* v. *Sheaman*, 28 Ind. 427.

The only other error assigned is that the court erred in overruling the appellant's motion for a new trial.

While several reasons were assigned for a new trial, counsel for the appellant has confined his discussion to the sufficiency of the evidence to sustain the finding.

We do not consider or pass upon the objection urged by counsel for the appellee as to the technical sufficiency of the assignment of the reasons for a new trial.

The evidence was principally addressed to an answer of set-off—the appellee alleging indebtedness of the payee of the note to him before its assignment, and that the appellant took it with notice of the indebtedness. Except for inferences which may legitimately be drawn from the evidence, the evidence, as shown by the record, is very slight tending to show notice. It can not be said, however, that there is no evidence tending to establish that fact. There is evidence of some facts tending that way, while from some circum-

stances surrounding the transaction there arises a strong inference tending to the same conclusion. It is, in our opinion, a case where the trial court having weighed the evidence and reached a given conclusion, we can not under our rules disregard the finding.

Judgment affirmed.

Filed March 29, 1892.

No. 15,519.

HENDRY ET AL. v. CRANDALL.

APPEAL.—*Dismissal of.—Supreme Court.—Omission of Names of Certain Defendants in Docket-Entry.*—An appeal will not be dismissed because the names of certain persons appear among the appellants who were not parties to the judgment, the persons referred to being parties to the action, and the judgment for costs being rendered against the defendants generally, without setting out their names. The clerk, in giving the title of the cause in the docket-entry preceding the trial, seems to have omitted their names, but this was a mere clerical misprision which could not work a discontinuance of the cause as to them, or shield them from the judgment, which appears from the whole record to have been rendered against them and the other defendants.

TRIAL BY JURY.—*When Cause can not be Withdrawn from Jury.*—After a cause has been submitted to the jury for trial, the evidence introduced, argument had, and the jury has retired for consideration, it is too late for the court to reconsider its ruling, and, without the consent of both parties, withdraw the cause from the jury and decide it on the evidence that had gone to the jury.

From the Whitley Circuit Court.

J. A. Woodhull, W. M. Brown, D. R. Best, E. A. Bratton and *E. Davis*, for appellants.

T. R. Marshall and *W. F. McNagney*, for appellee.

MILLER, J.—We are asked to dismiss this appeal because the names of two persons appear among the appellants who, it is said, were not parties to the judgment.

The persons referred to were parties to the action, and the judgment for costs was rendered against the defendants generally, without setting out their names. The clerk, in giving the title of the cause in the docket entry preceding the trial, seems to have omitted these names, but this was a mere clerical misprision which could not work a discontinuance of the cause as to them, or shield them from the judgment, which appears from the whole record to have been rendered against them and the other defendants.

The motion to dismiss is overruled.

This was a proceeding instituted by the appellee to obtain a license to sell intoxicating liquors. The appellants were remonstrants.

The cause was appealed to the circuit court, in which court the appellants asked that the cause be tried by the court without the intervention of a jury. This motion was overruled and the cause submitted to a jury for trial.

After the case had been fully tried and submitted to the jury for determination, and they had failed to agree, the court, of its own motion, withdrew the cause from their further consideration, discharged the jury, and found for the appellee upon the evidenee that had been given to the jury upon the trial.

The appellants excepted to this action and ruling of the court, and have assigned it as error here.

We are of the opinion that after the cause had been submitted to the jury for trial, the evidence introduced, argument had, and the jury had retired for consideration, it was too late for the court to reconsider its ruling, and, without the consent of both parties, withdraw the cause from the jury and decide it on the evidence that had gone to the jury.

We must presume that the court gave the same attention to the evidence as it was introduced, and scrutinized the manner and conduct of the witnesses, just as he would have done if the trial had taken place without the empanelling of a jury; but we can not presume that the appellants were not

put to a disadvantage by the change in the tribunal trying the cause, after the evidence had been heard and cause argued.

The record shows that counsel for the appellant prepared instructions which they desired given to the jury, and interrogatories to be answered by them. This was a practice pertinent and proper in jury trials, but entirely out of place in a hearing by the court. It may have been that the conduct and management of the trial were different in many respects from what it would have been if the trial had been by the court from its inception. The time and labor consumed in the preparation of instructions and interrogatories might have been used in preparing special findings for the court.

This is not a case where a slight departure was had from the usual practice, in which the burden is upon the objector to show that he has been injured, but is a case where the practice is so unusual as to raise a presumption of injury.

We can not say from an examination of the evidence and other rulings of the court that the substantial rights of the defendants have not been prejudiced.

Judgment reversed.

Filed March 29, 1892.

No. 15,629.

131	46
168	552

Coon v. Cronk.

Practice.—*Conflict of Evidence.*—The mere weakness or conflict of evidence will not justify the setting aside of the finding of the trial court. There must be an entire want of evidence on some material point.

From the Hancock Circuit Court.

J. A. New and *A. M. New*, for appellant.

E. Marsh and *W. W. Cook*, for appellee.

McBride, J.—The only question argued by counsel for

the appellant is the sufficiency of the evidence to sustain the finding of the circuit court.

The suit was by the appellant for the partition of certain land in which he claimed an interest under the will of his father. The appellee claimed that there had been a parol partition of the lands belonging to the father's estate, in which the appellant had participated; that a written contract was made evidencing the terms of the partition, and that deeds were subsequently executed confirming it; that possession was taken, and thereafter held under the partition thus made; and that, by the terms of such partition, the appellant parted with his interest in the lands in controversy.

There was evidence tending to support the claims of the appellee. Neither the written contract nor the deeds were in evidence. There was evidence, however, admitted apparently without objection, tending to show the execution of both. The evidence is very far from being satisfactory.

It can not be said, however, that there was no evidence tending to support the finding of the court.

Mere weakness of evidence will not justify us in setting aside the finding. There must be an entire want of evidence on some material point. Here the evidence, while apparently very weak, was conflicting. The trial court was charged with the duty of weighing the evidence and determining the conflict.

Our rules forbid that we should disturb the conclusion thus reached.

Judgment affirmed.

Filed March 31, 1892.

131 46
131 270'
131 273
131 46
150 485
152 374
152 378

No. 15,693.

PLAUT ET AL. v. STOREY.

CHATTEL MORTGAGE.—*Given to Save Surety on Note Harmless.—Right of Payee of Note to Foreclose.—Trustee.—Who May Plead.—Disability of Married Woman.*—The owner of personal property mortgaged it to his wife, the consideration being that she had become liable to pay certain notes executed by him; and it contained a condition that if he should pay the notes and hold her "harmless and exempt from paying the same, or any part thereof, then" the mortgage to be void, otherwise to remain in force.

Held, that the lien of the mortgage attached to the property in the nature of a trust, so remained until the notes were paid, and that the payee or owner of the notes could maintain an action to foreclose the mortgage.

Held, also, that her coverture could not be set up as a defence by those claiming a lien on said property which was subsequent to the lien of the mortgage, on the ground that there was no consideration for her assuming the payment of the notes for the reason that a married woman could not become surety.

Held, further, that a contract of suretyship by a married woman can only be avoided by her or by those in privity of blood with or in representation of her.

TRUSTEE.—*Beneficiary's Notice of Creation of Trust Fund.*—It is not necessary that the beneficiary of a trust should have requested or have knowledge of the creation of the fund to enable him to maintain a suit therefor.

From the Bartholomew Circuit Court.

G. W. Cooper, *C. B. Cooper* and *J. W. Baird*, for appellants.

S. Stansifer and *C. S. Baker*, for appellee.

MILLER, J.—On the 12th day of December, 1888, James H. Arnold executed a chattel mortgage on a stock of goods to Anna C. Arnold to secure the payment of four promissory notes executed by him to her, and containing in addition the following provision:

"Whereas, the said James H. Arnold is indebted to one John V. Storey in the sum of $655, with interest thereon, evidenced by two promissory notes, one dated January 1st, 1888, for $530, due one year after date, and one for $125,

dated 1888, due one day after date; and whereas, the said Anna C. Arnold has become responsible for the payment of said notes when due: Now, therefore, if the said James H. Arnold shall pay said first four notes when due, with interest, and shall pay the two promissory notes to John V. Storey and hold the said Anna C. Arnold harmless and exempt from paying the same, or any part thereof, then this instrument to be void, otherwise to remain in force."

This action was brought by the appellee for the foreclosure of the mortgage. The complaint makes James H. Arnold, the mortgagor, Anna C. Arnold, the mortgagee, the appellants, and the sheriff of the county, defendants.

The complaint, in addition to the usual averments in such actions, contains the following:

"That said mortgage was duly acknowledged and recorded in the recorder's office of Bartholomew county on the 12th day of December, 1888, and accepted by said plaintiff; that plaintiff's said notes were the first to become due of those secured by said mortgage, and said mortgage thereby became and was a first lien on said property in favor of said plaintiff; and, further, by the terms of said mortgage the defendant Anna C. Arnold assumed and became liable for the payment of plaintiff's said notes."

It was also averred that after the execution of the mortgage the appellee caused the mortgaged property to be seized by the sheriff in certain attachment proceedings against the defendant, James H. Arnold. The prayer was for a foreclosure, and that the mortgage be declared a lien prior and superior to the attachment, and for a personal judgment against James H. and Anna C. Arnold.

The appellants demurred to the complaint. Their demurrer was overruled, and exceptions taken. This ruling is assigned as error in this court.

The appellants claim that the mortgage was given only to secure Anna C. Arnold against loss by reason of her supposed liability to pay the debt to the appellee; that it was

intended to indemnify her against loss, and not for the use or benefit of the appellee.

The appellee insists that, treating the mortgage as a mere indemnity, it inured to the benefit of Storey. Also, that the contract was more than a mere indemnity; that it also contains an agreement to pay the debt.

Stripped of extraneous matter the contract, as evidenced by the mortgage, shows that James H. Arnold was indebted to the appellee, and by some arrangement between James H. and Anna C., she became liable, in some secondary capacity, to pay this debt to the appellee, Storey, and that the mortgage was executed to be void if James H. "shall pay the two promissory notes to John V. Storey, and hold the said Anna C. Arnold harmless and exempt from paying the same, or any part thereof."

This is not, in terms, such an agreement as that set forth in the cases of *Loehr* v. *Colborn*, 92 Ind. 24, *Bodkin* v. *Merit*, 86 Ind. 560, *Sperry* v. *Dickinson*, 82 Ind. 132, *Gunel* v. *Cue*, 72 Ind. 34, where the promise was that "the mortgagors expressly agree to pay said sum above secured;" but it is not essential to the validity of the promise that it should be contained in these or similar words.

The language used is much like that contained in the mortgage in *Eastman* v. *Foster*, 8 Met. 19, where it was provided that if the said mortgagors "shall pay said notes, and every way indemnify and save harmless the said Solomon K. from all trouble and expense, then this deed to be void; otherwise in power." In that case it was held that the mortgage to the surety created a trust and an equitable lien for the holders of the notes; that such lien attached to the property in the nature of a trust, and would so remain until the debts were paid.

A concise statement of the law upon this subject is contained in Brandt Suretyship (2d ed.), section 324, as follows:

"As a general rule, where a surety, or a person standing

in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him. The right of the creditor is the same when the security is a mortgage or other lien given the security by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given. To entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law, or have reduced his debt to judgment. A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and lien which subsist after the creditor's claim on the surety for the payment of the note is barred at law by the statute of limitations, and the fee of the mortgaged property has by foreclosure become vested in the surety. The trust which inures to the benefit of the creditor subsists till the debt is paid, and may be enforced against anyone who takes the property with notice. After a trust of this kind has been created, it can not usually be defeated without the consent of all parties in interest, unless it be by a conveyance to a *bona fide* purchaser without notice."

We do not regard the presence in the mortgage of a promise to pay the debt as of any particular importance, where, as in this case, the action is brought by the creditor against the principal debtor, after the maturity of the debt. In a suit brought by an indemnified surety, who has not paid the debt

or been otherwise damnified, it is of course necessary to a recovery. The cases of *Gunel* v. *Cue*, *supra*, and *Bodkin* v. *Merit*, *supra*, are of this class.

In discussing this question in the case of *Aldrich* v. *Blake*, 134 Mass. 582, the court said:

"A mortgage made by a principal to a surety, to secure the payment of a note, is not to be regarded in equity simply as an indemnity to the surety. It is not important whether it is in form to pay the debt or to indemnify the surety. Where its object is to provide for the payment of debts, or to enable the surety to do so, he is constituted a trustee for the creditors whose debts are enumerated in the condition.

In *Hampton* v. *Phipps*, 108 U. S. 260, this language was used:

"The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

We are of the opinion that the court did not err in overruling the demurrer to the complaint.

The action of the court in sustaining the demurrer to the second paragraph of answer is assigned as error.

The answer is as follows:

"And for amended second paragraph of separate answer to plaintiff's complaint these defendants say: That at the time it is charged that the said Anna C. Arnold assumed the payment of plaintiff's notes, and at the time of the execution of said mortgage, the said Anna C. Arnold was and still is the wife of her co-defendant James H. Arnold, and the notes made by said James H. Arnold to his said wife were, and are, wholly without consideration, and said mortgage was executed to his said wife in pursuance of an agreement between the said Arnolds for the purpose of cheating, hindering and delaying the creditors of said James H. Arnold, and said mortgage was executed without the knowledge, request or con-

sent of said Storey, plaintiff herein, and the same never was delivered to him nor in any other manner executed, except by being placed upon record in the recorder's office of Bartholomew county, Indiana.

Wherefore the said mortgage as to these defendants is without consideration, fraudulent and void."

Appellants' counsel contend that the only consideration for the execution of the mortgage was the assumption by the wife of James H. Arnold of his debt to Storey, and that, a married woman being forbidden by statute, section 5119, R. S. 1881, to enter into any contract of suretyship, such contract was void, and the mortgage without any consideration to support it.

By the express terms of the statute, it is declared that "such contract, *as to her*, shall be *void*."

In construing this act this court in *Bennett* v. *Mattingly*, 110 Ind. 197, held that such contracts are voidable, not void, and that they could be avoided only by such married woman, being as to third parties valid contracts. In that case it was held that the inhibition contained in the statute could not be invoked by a purchaser of the land upon which the mortgage executed for the debt of her husband rested.

In *Johnson* v. *Jouchert*, 124 Ind. 105, it was held that only the person upon whom the disability rested or those in privity of blood or in representation could avoid such contract. In that case, also, it was held that a purchaser who took title from the mortgagors could not plead the coverture of their grantor to avoid the encumbrance.

In the case before us the appellants, who seek to defeat the operation of the mortgage, are neither privies in blood, estate or representation of Anna C. Arnold, but are attaching creditors of her husband. They are, therefore, in no condition to avail themselves of the protection afforded her by the statute. It does not appear from the record but that she is entirely content with her contract.

The allegation in the answer that the mortgage was exe-

cuted in fraud of the creditors of James H. Arnold, does not, as against the appellee, strengthen the position of the appellants. It is not disputed but that the indebtedness of James H. Arnold to the appellee is *bona fide*, nor claimed that the appellee was a party to or had any knowledge of the fraud. We are of the opinion that the appellee does not claim through or under the mortgagee in any such sense as to be affected by the frauds or secret equities between her and her husband.

An indemnified surety stands much in the position of a trustee holding a fund for the payment of the debt, whose misdeeds can not impair the rights of the beneficiary.

Neither was it necessary that the appellee should have knowledge of or have requested the mortgage to have been executed. *Carter* v. *Taylor*, 9 Paige, 492. The complaint shows that before action was brought the appellee accepted the provision made for his benefit. Not being a party to the instrument, it was not necessary to deliver the mortgage to him—an acceptance of its provisions was all that was necessary on his part.

We are satisfied that the action of the court in sustaining the demurrer to the second paragraph of answer was not erroneous.

What we have said disposes of the questions of law raised upon the action of the court in overruling the motion for a new trial, and it would be useless to prolong this opinion by discussing them in detail.

Judgment affirmed.

Filed April 1, 1892.

No. 15,686.

CRAWFORD *v.* GRAY.

DECEDENTS' ESTATES.—*Sale.—Purchase by Executor's Wife.*—Where two executors offer real estate of the testator for sale at public auction in pursuance of an order of court, the wife of one of the executors may, in good faith, become a purchaser of the real estate at such sale, and derive a valid title to the real estate through such purchase.

From the Rush Circuit Court.

W. A. Cullen and *J. D. Megee*, for appellant.

J. D. Miller, *F. E. Gavin*, *B. L. Smith*, *C. Cambern* and *T. J. Newkirk*, for appellee.

OLDS, J.—The question presented for decision in this case arises on the ruling of the court in sustaining demurrers to the appellant's answer and cross-complaint.

The facts alleged in each paragraph of answer and cross-complaint are substantially as follows: The real estate in controversy was the property of William Crawford, the father of the appellant, who died testate, and appointed one George Gray and Solomon P. Hilligoss his executors. The executors obtained an order from the Rush Circuit Court to sell the real estate to pay the debts of the testator, and it was offered in pursuance of such order for sale at public auction, and bid in by one James M. Gwinn, who was the son-in-law of appellee, in the name of the appellee, for $1,400. At the time of the sale appellee was the wife of said George Gray, one of the executors, and it is alleged that the property was in fact worth at the time $2,800, and appellee is now the widow of said George Gray.

The question presented is as to whether or not, where two executors offer real estate of the testator for sale at public auction in pursuance of an order of court, the wife of one of the executors may, in good faith, become a purchaser of the real estate at such sale, and derive a valid title to the real estate through such purchase.

There is no fraud or collusion alleged. There is an allegation that the real estate was worth more than the amount for which it was sold to the wife. It is contended on behalf of counsel for appellant that an executor can not become a purchaser at his own sale, and that the husband and wife are, in legal contemplation, one person, and therefore the wife can not become the purchaser at a sale made by her husband and another as executors; that when the wife takes title under such purchase the husband acquires an interest in the real estate, and that the wife can not convey the real estate except by deed in which her husband joins.

We can not concur with the theory of counsel that the husband and wife's legal existence is so blended together as to constitute in law but one person, and rendering the wife unable to purchase real estate sold by her husband and his co-executor at public auction.

Under the law of this State, as it is now and was at the time of this sale by the executors and purchase by the appellee, the wife had quite as distinct and individual an existence relating to her right to contract for and purchase real estate and take title in her own name, and hold, use and enjoy the same as did her husband.

She has the same right to invest her own money in the purchase of real estate as her husband, and regardless of the will of her husband. When once the title is vested in her, true she can not convey or encumber the same except by deed in which her husband joins, but there are no restrictions on her right to purchase and take title in herself. This she can do without his aid or consent, and he has no legal power to restrain or prevent her from doing so.

At the executor's sale the land was offered at public auction. In offering the land for sale the executors were acting under and in pursuance of an order of court. All who desired had the right to bid and become purchasers. The wife of one of the executors having the right to use her individual means as she willed, she had the same right to bid and

to become a purchaser in good faith as did any other individual, and to authorize an agent to act for her and bid the land off for her, and take title in her own name. Before the purchase the wife had no interest in the land. The husband was acting in a fiduciary capacity; it was not necessary that the wife join him in a deed to pass title. The title was not even in the husband. It was the title which the testator held at his death that the executors conveyed to the wife. There is no fraud charged upon the part of either the appellee or the executors, or any collusion between the appellee and her husband.

It is not averred but what the sale was in good faith, or that the appellee was not the highest and best bidder, and the sale was at a public auction. The mere averment that the land was in fact worth more than the amount for which it was sold is not sufficient to invalidate the sale.

Section 5115, R. S. 1881, abolishes all the legal disabilities of married women to make contracts except as provided by the statute.

Section 5116, R. S. 1881, provides that the lands of a married woman, together with the rents and profits thereof, shall be her separate property as fully as if she were unmarried, except that she shall not convey or encumber except by deed in which her husband joins.

It has long been the law of this State that the wife might sue her husband when the action related to her separate property. And in *Crater* v. *Crater*, 118 Ind. 521, it was held that she might maintain an action of ejectment against her husband for the possession of her separate real estate.

There is no error in the rulings of the court.

Judgment affirmed, with costs.

MILLER, J., took no part in the decision of this case.

Filed April 1, 1892.

131	56
131	263
131	286
132	74
133	48
131	56
137	406
138	611
131	56
141	67
142	577
143	408
131	56
163	115

No. 14,722.

The Board of Commissioners of Vermillion County v. Chipps, Administrator.

Practice.—*Testing Complaint for First Time on Appeal.—Rule as to.*—Where the sufficiency of a complaint is questioned for the first time in the Supreme Court by assignment of error, it will withstand such attack if it be sufficient to bar another action for the same cause, and would be good after verdict.

Same.—*Sustaining Demurrer to Good Paragraph.—Facts Provable Under General Denial.*—It is not error to sustain a demurrer to a good paragraph of answer if all the matters therein averred are admissible in evidence under the general denial, which is pleaded.

Bridges.—*Neglect in Constructing or Repairing.—County Liable.*—A county is liable for a failure to exercise reasonable care in the construction of its bridges, or to exercise reasonable care in keeping them in repair.

Same.—*Counties not Insurers.—Anticipating New or Unusual Use of.*—Counties are not insurers of the safety of their bridges, nor are they bound, when constructing them, to anticipate uses not then known, and necessities which are not within ordinary experience.

Same.—*Repairing.—Sufficiency of.*—In repairing bridges counties have performed their whole legal duty when they have put them in as good a condition of strength and soundness as will make them as secure as new bridges of the same kind and plan.

Same.—*Latent Defects.*—In the construction of a bridge a county is not liable for latent defects, which could not have been discovered by the use of reasonable diligence in the material used; and it is only bound to use ordinary or reasonable care to make the structure safe for the uses for which it was intended.

Same.—*Employing Suitable Person to Examine and Repair.—County not Liable for His Error.*—If a county employ a competent person to examine and repair a bridge, and he makes the examination and repairs it, and reports that it is sufficient, the county is not liable if his judgment as to the sufficiency of the bridge was erroneous.

Same.—*Ordinary Use of Bridge.—Plaintiff Must Show He was so Using.*—In order to recover damages caused by a bridge breaking down, the plaintiff must show that at the time of the accident he was using the bridge in the ordinary and usual manner in which *that* bridge was, had been, and was intended to be used; and if he was not travelling in the usual and ordinary way in that vicinity he can not recover.

Same.—*Extraordinary Use.*—One who uses a bridge in an unusual manner or subjects it to an unusual or extraordinary load or strain, and is thereby injured, can not recover damages for such injury.

SAME.—*Proof of Use of Bridges for Traction Engine.*—In an action for an injury caused by a county bridge breaking down by reason of running a heavy traction engine upon it, it is error to allow the plaintiff to prove that traction engines had passed over other highways and bridges in the county, if the bridge broken down had been constructed several years before traction engines were known or used.

NEGLIGENCE.—*When Question of Law for the Court.*—Where the facts are undisputed, and can lead to only one conclusion, the question of negligence is a question of law for the court.

McBRIDE, J., dissents.

From the Fountain Circuit Court.

M. G. Rhoads and *I. F. Davidson*, for appellant.

H. H. Conley, *J. C. Sawyer* and *H. H. Dochterman*, for appellee.

COFFEY, J.—The complaint in this case alleges that the appellee is the duly appointed and qualified administrator of the estate of Robert Baker, deceased; that, on the 20th day of July, 1887, there was a bridge in Vermillion county which had prior thereto been constructed by said county, and which it was bound to maintain; that it had negligently constructed said bridge by placing therein weak, knotty and defective timbers, leaving it in an unsafe condition, and that it had negligently accepted said bridge, from the contractor who built the same, in an unsafe condition for passengers, by reason of the weak, knotty and defective pine timbers placed therein, while the contract and specifications for said bridge provided that the same should be constructed in a good, substantial, workmanlike manner, of poplar timber; that it had negligently suffered said bridge to remain in such unsafe condition, and to become out of repair, so that on the 20th day of July, 1887, the joists and other timbers upon which the floor of said bridge was laid were defective, weak, brittle, knotty, old, decayed and rotten, so that it was dangerous for persons to pass over the same in the ordinary use of said highway, of which the county had notice; that on that day the deceased, Robert Baker, not knowing the defective, decayed and dangerous condition of the bridge, but having reason to

believe it was in good repair and in safe condition, attempted to pass over the same with a portable traction engine used for threshing grain, and by reason of the defective, decayed and dangerous condition of the bridge, caused by the failure and neglect of the board of commissioners of the county to properly construct and keep the same in repair, and without any fault on the part of the deceased, the bridge gave way and precipitated the deceased and said engine into the stream below, a distance of sixteen feet, whereby he was, without any fault on his part, stunned, bruised and scalded, from the effects of which he died; that he left a widow and two children, who were dependent upon him for support.

To this complaint the appellant filed an answer in two paragraphs:

First. The general denial.

Second. Alleging contributory negligence.

The court sustained a demurrer to the second paragraph of the answer, to which appellant excepted.

A trial by jury resulted in a general verdict for the appellee. The jury also returned answers to interrogatories with their general verdict.

Over a motion for new trial the court rendered judgment on the general verdict for the appellee.

Several reasons for a reversal of the judgment of the circuit court are urged here, which will be considered in the order in which they are presented by counsel for appellant.

First. It is contended that the complaint above referred to does not state facts sufficient to constitute a cause of action.

The sufficiency of the complaint is questioned for the first time in this court by an assignment of error.

It is settled that where the sufficiency of a complaint is questioned for the first time in this court by assignment of error, it will withstand such attack if it be sufficient to bar another action for the same cause, and would be good after verdict. *Du Souchet* v. *Dutcher*, 113 Ind. 249; *Orton* v. *Tilden*, 110 Ind. 131; *Hornady* v. *Shields*, 119 Ind. 201.

In the case of *Board, etc.*, v. *Montgomery*, 109 Ind. 69, it was said by this court: "The liability of counties for negligence in constructing or maintaining bridges is no longer an open question in this State, for there are many cases declaring that they are liable."

The complaint before us sufficiently alleges the negligence of the county, both in constructing and maintaining the bridge therein described, and contains the necessary allegation that the deceased was without fault.

It is conceded by the appellant's counsel that ordinarily this would be sufficient, but it is insisted that it *is* not sufficient under the rule announced in the case of *City of Wabash* v. *Carver*, 129 Ind. 552.

In that case a rehearing was granted, and upon a reconsideration of the question it was held that the complaint in that case stated a cause of action. We think the complaint in this case is also sufficient.

The court committed no available error in sustaining a demurrer to the second paragraph of the appellant's answer, as all the matters therein averred were admissible in evidence under the general denial, which was pleaded. *Board, etc.*, v. *Legg*, 110 Ind. 479; *Haywood* v. *Hedrick*, 94 Ind. 340; *Becknell* v. *Becknell*, 110 Ind. 42.

The facts in the case, as they are disclosed by the evidence, are that the bridge mentioned in the complaint is a covered bridge, about thirty feet in length, and was constructed in the year 1869. For at least ten years after its construction traction engines were not used in Vermillion county, where the bridge is situated, but for the period of four or five years prior to July, 1887, they had been in general use. On the 20th day of July, 1887, the appellee's intestate attempted to cross the bridge with a traction engine weighing eight thousand six hundred pounds, when the bridge gave way, and he was thereby killed.

The evidence tends to show that six thousand pounds was

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The evidence tends to show that six thousand pounds was

the, heaviest loads to which bridges in that neighborhood were subject at the time this one was constructed.

The bridge in question was constructed by one Daniels, an expert bridge builder, under plans and specifications furnished by the county.

The evidence tended to prove that some of the timbers which gave way were knotty and brittle, and had begun to decay.

One Britton, an expert, called as a witness by the appellee, testified that the defects in these timbers were original defects, the timber being unfit for use as bridge timber by reason of its knotty and brash condition, while Daniels, an expert, called by the appellant, and the person who constructed the bridge, testified that the timber was good and was suitable for the construction of a good and safe bridge, and was such as was put in all bridges at the time this was constructed, and that he inspected and accepted the timber, believing it to be suitable for the purpose intended.

Two or three weeks prior to the accident above mentioned the trustee of the township in which the bridge is situated employed a carpenter, of twenty-four years' experience, to examine the bridge, and make a careful inspection of its timbers, and put the same in good repair, which he, in connection with the supervisor, proceeded to do. He put in some new timbers, and, after inspection, pronounced the other sound and safe, and supplied the bridge with a new floor.

On the trial of the cause the court, over the objection and exception of the appellant, permitted the appellee to prove that in other parts of the county, and on other highways than the one in controversy, traction engines were common, and that it was customary for them to cross the bridges on such highways.

The decided weight of authority is that, in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair. Elliott Roads and Streets, p. 42.

The reason given, in most of the adjudicated cases, for holding that counties are not liable in such cases is that, as the State would not be liable, it is unreasonable to hold that a public corporation, such as a county, which is a mere governmental instrumentality, should be held liable. But whether this reason is valid or otherwise, we need not stop to inquire, for it is now firmly settled in this State that a county is liable for a failure to exercise reasonable care in the construction of its bridges, or to exercise reasonable care in keeping such bridges in repair.

Counties are not insurers, however, of the safety of their bridges, nor are they bound, when constructing them, to anticipate uses not then known, and necessities which are not within ordinary experience. So, in repairing, they have performed their whole legal duty when they have put them in as good a condition of strength and soundness as will make them as secure as new bridges of the same kind and plan. *Fulton, etc., Works* v. *Kimball Tp.*, 52 Mich. 146; *Medina Tp.* v. *Perkins*, 48 Mich. 67; *McCormick* v. *Washington Tp.*, 112 Pa. St. 185; *Board, etc.*, v. *Pearson*, 120 Ind. 426.

In the case of *Board, etc.*, v. *Pearson*, *supra*, it was said by this court: "A corporation charged with the duty of keeping a bridge in repair must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made. If, however, ordinary care is used in selecting suitable persons, and in requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability."

The first question presented for our consideration under the facts above stated is this, was the board of commissioners guilty of negligence in accepting the bridge, mentioned in the complaint, at the time of its construction?

If the question as to whether some of the timbers used in the bridge were defective was the only question involved, we could not disturb the verdict on the evidence, for we will not

weigh conflicting testimony; but the question in the case is not alone as to whether the timber was defective, but the further question exists as to whether the defect was of such a character as to charge the county with negligence in accepting a bridge containing such timber.

In the construction of bridges the county is not liable for latent defects, which could not have been discovered by the use of reasonable diligence, in the material used, and it is only bound to use ordinary or reasonable care to make the structure safe for the uses for which it was intended. *McCormick* v. *Washington Tp., supra.*

The case last cited was a case where a bridge gave way by reason of defective timber, under the weight of a traction engine, and the court instructed the jury as follows: "If the jury believe that the supervisors, or those in their employment, when rebuilding the bridge in July or August of 1883, tested the alleged defective chord or stringer by cutting into it with an ax, or in any other manner, as an ordinarily prudent man would do under the same circumstances, they performed their duty, and negligence can not be inferred because of a mistake made in the performance of such duty." The Supreme Court of Pennsylvania held this instruction to be a correct exposition of the law.

In the case of *Medina Tp.* v. *Perkins, supra,* where a bridge gave way by reason of defective timber, under the weight of a portable engine, the Supreme Court of Michigan, in discussing the question as to the duty of the township officers in relation to bridges, said: "The law will not impose an impracticable rule of duty. Township officers are not expected to be experts, nor learned engineers, nor persons liberally instructed in mechanics, nor individuals equipped with the resources of experienced specialists; and nothing more can be demanded of them than reasonable intelligence and ordinary care and prudence. And no duty is enjoined on the township to keep informed of the condition of its bridges

that may be taken as being above the capacity of its own officers."

In this case no complaint is made of the plan of the bridge. The county employed a skilled and competent person to construct it according to the plans and specifications. Such skilled person inspected and received the timber which entered into its construction, and testifies that in his opinion they were suitable for the purpose for which they were used. He further testified that such timbers were used at the time the bridge was built by all persons of competent skill. It is not denied or disputed that the expert employed by the county to construct this bridge honestly believed the timbers used by him, after inspection, to be suitable bridge timbers. Is it to be said that the officers of the county, who are not presumed to be experts, are guilty of negligence in accepting a bridge containing timbers which an expert did honestly believe sufficient?

The timbers of which complaint is now made did, in fact, prove to be sufficient to bear up all ordinary loads to which they were subjected for a period of eighteen years.

In view of these facts, we are of the opinion that the evidence in the cause does not make a case of negligence against the county in accepting the bridge in question from the contractor. To hold otherwise would require of the board of commissioners something more than ordinary diligence, and would, in fact, make it the insurers of the safety of the county bridges.

Where the facts are undisputed and can lead to but one conclusion, the question of negligence is a question of law for the court. *Mann* v. *Belt R. R., etc., Co.*, 128 Ind. 138.

Nor do we think the evidence sustains the charge that the county was guilty of negligence in failing to keep the bridge in repair.

About two or three weeks prior to the accident we are now considering, the proper legal authority employed a competent person to examine the bridge and put the same in good

repair. He proceeded to do so, and gave the timbers such examination as he deemed necessary to test their soundness, and did such other things as he thought necessary to make the bridge safe. If he made a mistake, the county can not be charged with negligence by reason of such mistake. The duty of the county was to exercise reasonable care in selecting a proper person to examine and repair the bridge, and to require of him the exercise of his skill, and if it did so, and the bridge still remained unsafe, the county was not liable. *Board, etc.*, v. *Pearson, supra.*

As the legislative department of the State has determined that the removal of traction engines upon the public highways is a subject calling for the exercise of the police power, it may fairly be considered a question as to whether we are not bound to know that the use of the highways for that purpose is not usual and ordinary. Elliott's Supplement, section 347.

But, without stopping to inquire whether we are or are not bound to take such notice, we think the court erred in permitting the appellee to prove, on the trial of this cause, that it was usual and ordinary for traction engines to pass over other highways and bridges than the one in controversy. It did not tend to prove that the deceased, in using the bridge mentioned in the complaint, was using it in the usual and ordinary way.

In the case of *McCormick* v. *Washington Tp., supra,* it was held that in order to recover the plaintiff must show that at the time of the accident he was using the highway in the ordinary and usual manner in which *that* highway was, had been and was intended to be used, and if he was not travelling in the usual and ordinary way, in that vicinity, he was not entitled to recover.

As we have seen, this bridge was constructed at least ten years before traction engines came into use.

In the case of *Fulton, etc., Works* v. *Kimball Tp., supra,* in speaking of the subject of repairs, the Supreme Court of

Michigan said: "When it (the statute) requires repairs it may fairly be construed as requiring bridges to be put in as good a condition of strength and soundness as would make them as secure as new bridges of the same kind and plan. But it does not require a different structure."

The rule that one who uses a bridge in a manner not usual or ordinary, or subjects it to an unusual or extraordinary load or strain, and is thereby injured, can not recover damages for such injury, is well settled.

That the proof that traction engines had passed over other highways and bridges in the county was considered by the jury in this case as proof that the deceased was using the bridge in controversy in the ordinary and usual way, is made to appear by their answers to interrogatories, for they so find; whereas there is no proof in the record that more than one engine had, prior to the injury complained of, passed over this bridge.

The fact that one engine passed over the bridge shortly before this accident does not make that the usual and ordinary mode of travel over it. The admission, therefore, of evidence that traction engines had passed over other highways and bridges in the county was not only error, but it was an error which resulted in an injury to the appellant.

For the errors above indicated the circuit court should have granted a new trial.

Judgment reversed, with directions to sustain the appellant's motion for a new trial in this cause.

McBride, J., dissents.

Filed Jan. 15, 1892; petition for a rehearing overruled April 1, 1892.

131 66
132 332

No. 15,733.

Adams et al. v. Buhler et al.

Mechanic's Lien.—*Notice.*—*Where Recorded.*—The notice of a mechanic's lien must be recorded in the "Miscellaneous Record Book" of the recorder's office. Elliott's Supp., section 1697.

Same.—*Evidence of Contents of Notice.*—*Mechanic's Lien Record.*—The "Mechanics' Lien Record," where one is kept in the recorder's office, is not admissible to prove the contents of a notice of a mechanic's lien, unless it be shown that no proper record of such lien was made, that the original is lost, and that the copy in such record is a true copy.

Same.—*Recording.*—To enforce a mechanic's lien it is sufficient to show that it was filed in the recorder's office, and the fact that it was not recorded will not defeat the enforcement of the lien.

Same.—*Contents of Notice.*—*What Must Contain.*—Where the notice of intention to claim a mechanic's lien by a material man or sub-contractor is filed in the proper recorder's office, it is not necessary that such notice should contain a statement that the owner was notified by the claimant of his intention to secure a lien. Elliott's Supp., section 1690.

Evidence.—*When Record of Instrument may be Used.*—The record of an instrument is effective for evidence only when such record is made by the proper officer and in the mode prescribed by law.

From the Adams Circuit Court.

J. T. France, *J. T. Merryman* and *E. A. Huffman*, for appellants.

P. G. Hooper, *E. G. Coverdale* and *J. J. M. La Follette*, for appellees.

Elliott, C. J.—This case is in this court for the second time—*Adams* v. *Buhler*, 116 Ind. 100. It is now contended that the notice of an intention to hold a lien upon the real estate described is insufficient. Counsel say of the complaint: "We incline to think that it fails to show a sufficient notice filed with the recorder to constitute a lien against appellants' property, in that the notice having shown that the labor was performed for a contractor and not for the owner, we think it should have shown that the proper antecedent steps had been taken by notifying the appellants at or before the time of performing the labor." The contention

of counsel can not prevail. The law prescribes what the notice filed with the recorder shall contain, and it does not require it to state that the owner was notified that the material man or sub-contractor intends to secure a lien. Elliott's Supp., section 1690.

The sub-contractor or material man must, under the statute of 1883, notify the owner, but he is not required to state that fact in the notice filed with the recorder.

The appellants insist that the trial court erred in admitting in evidence the record of the notice given by the appellees. They support their position by the argument that the notice was not recorded in the proper record, inasmuch as it was recorded in the "Mechanics' Lien Record," and not in the "Miscellaneous Record." Their claim is that there is in law no such record as that first named. The appellees meet this argument by asserting that the filing of the notice creates the lien, and in this they are sustained by the case of *Wilson* v. *Hopkins*, 51 Ind. 231. But this assertion does not fully answer appellants' argument, for it may be conceded that the lien attaches when the notice is filed, and yet not necessarily follow that the record is admissible to prove the contents of the notice. Proving the filing and proving the contents of the notice are essentially different things. The question, therefore, is, was it competent to prove the notice by the entry in the Mechanics' Lien Record? It is established that the recording of an instrument is effective only when the recording is made by the proper officer and in the mode prescribed by law. *Gossett* v. *Tolen*, 61 Ind. 388; *Wilson* v. *Hopkins*, *supra*; *Deming* v. *State, ex rel.*, 23 Ind. 416; *Walter* v. *Hartwig*, 106 Ind. 123; *Brown* v. *Budd*, 2 Ind. 442. The statute by which this case is governed declares that the notice shall be recorded in the "Miscellaneous Record Book." Elliott's Supp., section 1697. As it was recorded in a different book, there is no record evidence that can take the place of the original instrument. We do not hold, nor mean to hold, that the appel-

lees have lost their lien, nor do we hold that they may not use the record as evidence in the event that the proper foundation is laid. What we hold is that the record is not primary evidence. We do not doubt that the lien may be enforced by proving the written notice required by the statute, but we are compelled to hold that the record book introduced by the appellees is not the source of primary evidence. If the appellees had shown the loss of the original instrument and that it was correctly copied in the record, they might have used the record as secondary evidence, but they can not use it without accounting for the original or best evidence. If the original notice had been introduced we should hold that the error in admitting secondary evidence was harmless; the notice, however, is not in the record, nor is there any legitimate evidence of its contents.

It is with reluctance that we reverse the judgment, but under the law we can not do otherwise.

Judgment reversed.

Filed March 31, 1892.

No. 14,178.

Painter v. The Industrial Life Association.

Life Insurance.—*General Agent, Who Is.—Powers of to Grant Extension of Time of Payment.*—An agent of a mutual life insurance company, assigned to the territory of a State, charged with the duty of soliciting applications for membership, collecting membership fees, organizing local aid societies, appointing sub-agents, and in addition thereto empowered "to assist in working within the territory" named, "and to do and perform such other acts and things as may be necessary to build up the interests and defend the rights of said life association in said territory," is a general agent, and has power to orally agree to an extension of the time of payment of dues, even when the policy would be avoided if payment had not been made within the time limited, unless an extension had been granted.

SAME.—*Waiver of Forfeiture by Accepting Payment—Extension of Time of Payment.—Death on Day to Which Time of Payment was Extended.—Company Liable.*—A by-law of a mutual insurance company provided that full monthly payments were "due from each member on the first day of each calendar month, with the remainder of the month allowed as days of grace for payment," and that the membership "should not cease until after the days of grace" had expired. It was also provided that if any monthly payment was not paid to the association at its home office within the time as above stated, the membership should "cease and terminate, the certificate become null and void, and all money paid thereon be forfeited to the association, and credited to the contingent fund." The assured paid his installment, due September first, on October 4; the one due October first, November first; the one due November first, December 2d; and the one due due December first, by oral agreement with the general agent having the powers previously enumerated, was to have been paid January 5th; but before the close of business hours the insured suddenly fell dead.

Held, that the insurance company had extended the time of payment, and were liable.

SAME.—*Declarations of President of Insurance Company after Death of Insured.*—Conversations had with the president of the insurance company after the death of the insured, tending to show the powers of the agent above mentioned, and also showing a willingness to have accepted the payments after the days of grace had elapsed, is admissible in evidence when taken in connection with the other facts.

From the Marion Superior Court.

F. M. Finch and *J. A. Finch*, for appellant.

J. T. Dye, *W. P. Fishback* and *W. P. Kappes*, for appellee.

OLDS, J.—This action was brought by the appellant against the appellee upon a certificate of life insurance issued by the appellee to the appellant upon the life of her husband, George W. Painter, in the sum of $2,000.

Issues were joined. The first trial resulted in a verdict in favor of the appellee. The court granted a new trial. A second trial resulted in a verdict in favor of the appellant against the appellee for $2,480. Appellee filed its motion for a new trial, which was overruled, and an appeal was taken by the appellee to the general term of the superior court. At the general term the judgment at the special term was re-

versed for error in overruling the motion for a new trial, and from the action of the court at general term the appellant prosecutes this appeal, and assigns the ruling of the court at general term as error.

The certificate of insurance was issued on the 19th day of August, 1879. The association is a mutual association, and the certificate contains an agreement that the applicant shall "faithfully abide by all rules, and accept and obey all by-laws of the association, and pay all dues and monthly payments agreeable with said by-laws and the tables of monthly payments printed therein."

The rule of the association relating to the monthly payments is as follows:

"Section 33. The full monthly payment is due the association from each member on the first day of each calendar month, with the remainder of the month allowed as days of grace for payment; the monthly payments commencing with each member on the first day of the next month after the one in which the certificate of membership is dated, and the membership shall not cease until after the days of grace have expired; but if any monthly payment is not paid to the association at its home office in Indianapolis within the time hereinbefore named, the membership will cease and terminate, the certificate become null and void, and all money paid thereon will be forfeited to the association and credited to the contingent fund."

The monthly payments on this policy were made by George W. Painter, the insured, as follows:

1st. For September, 1879, was paid October 4th, 1879.

2d. For October, 1879, was paid November, 1st, 1879.

3d. For November, 1879, was paid December 2d, 1879.

4th. For December, the last day of grace for the payment of which was December 31st, 1879, was never paid.

On the 5th day of January, 1880, Mr. George W. Painter fell dead upon the street. The appellant afterwards tendered

to the appellee the amount of the monthly dues, but appellee refused to accept it.

The principal question presented is as to whether or not there had been a forfeiture of the policy such as the association had a right to rely upon as a defence to the right of recovery upon it.

It is contended by the appellee that there was a forfeiture of the policy by reason of a failure to pay the dues before the expiration of the days of grace allowed for payment, while upon the part of the appellant it is insisted that there was an extension of the time for the payment of the dues until and including the 5th day of January, 1880.

In the case of *Sweetser* v. *Odd Fellows, etc., Ass'n,* 117 Ind. 97, it was said by the court, that "It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture, if, by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessment will be received after the appointed day. The decisions which hold and enforce this view are very numerous," and numerous cases are cited.

It is further said: "Forfeitures are not favored in the law, and courts, in order to avoid the odious results of a forfeiture, are not slow in seizing hold of such circumstances as may have been acted upon in good faith, and which indicate an agreement on the part of the company, or an election, to waive strict compliance with the conditions and stipulations in the policy. Continuing a policy in force and accepting payment of premiums thereon, with full knowledge of facts which, according to a condition of the contract, make it voidable, is a waiver of the condition." In speaking of receiving payment of assessments after date named, the court further said in that case: "The company will not be heard to assert a forfeiture after the death of the assured, when, by its course of dealing with him, it may have induced him to believe payment might be made within sixty days after the

receipt of notice." *Michigan, etc., Ins. Co.* v. *Curtis*, 128 Ind. 25.

Section 37 of the by-laws provides that "lapsed members may be reinstated at any time within thirty days after lapse on payment of all back dues and giving a certificate of good health. After sixty days from lapse ex-members will be required to pay half the usual membership fee, be re-examined at their own expense and re-accepted by the association the same as a new member. The income of all restorations will be passed to the credit of expense funds."

It is contended that the payment of former monthly dues, after the lapse of the days of grace, was accepted under the provision of section 39 by a waiver of the certificate of a physician as to the good health of the insured by his appearing in person and answering as to his good health; and therefore the fact that the dues were paid after the lapse of days of grace has no bearing upon the question as to whether or not there was an understanding or agreement to accept dues after the expiration, and a waiver of any forfeiture by the company in case the assessment or dues were not paid within the time.

There is no admission or evidence conclusively showing that the former dues, which were paid after the expiration of the days of grace, were paid under the provisions of section 39, and the insured reinstated. The jury may have very properly found from the evidence that the policy was continued in force and the dues accepted after the days of grace had elapsed. The evidence shows that the dues for each month from the date of the issuing of the certificate up to the December instalment were paid after the lapse of the days of grace, and that they were accepted by the officers of the company and the policy continued in force.

There is also evidence tending to establish the fact that one George W. Joseph, the agent of the association, visited the insured when the December instalment of dues was payable and requested their payment, and agreed upon an

extension of time for the payment of the same until on January 5th, 1880, or, in other words, waived its payment until on that date.

It is insisted that Joseph was a mere special or local agent, and not authorized to extend the time for payment of monthly dues.

Joseph was appointed agent by written contract. The purport of the writing designated him as a special agent for the territory of Indiana, and enumerated certain of his duties, such as soliciting applications for membership, collecting membership fees, to organize local aid associations, appoint sub-agents, and in addition thereto it provided that he was "to assist in working within the territory hereby assigned, and to do and perform such other acts and things as may be necessary to build up the interests and defend the rights of said life association in said territory." This contract gave to Joseph the general power to do and perform such acts and things as were necessary to build up the interests and defend the rights of the company.

Mr. McCune, a witness, testified as to a conversation which took place between Mr. Morrison, at the time president of the association, and himself, in which Mr. Morrison said that it was the duty of the agent that solicited the person who was assured, to look after and take care of their interests in the policy.

The question as to whether or not this was a waiver of the time of payment on the part of the appellee, and the insured allowed to pay the same on the 5th day of January, 1880, was a fact for the jury to determine from the evidence. If the fact as to whether such extension was agreed to or not was to be determined alone on the construction to be placed upon the writing appointing Joseph an agent, then it would resolve itself into the construction of the writing by the court; but we think the general clause in the writing authorized Mr. Joseph to waive the date of payment if he deemed it for the best interest of the company, and this con-

tract, together with the other evidence in the case, authorized the jury to find that there was a waiver of the time of payment, and a consent to accept the payment on the 5th day of January, 1880, which would allow the payment during business hours of that day, and until that time expired the policy would be in full force, and upon that day the insured died, and the beneficiary is entitled to recover the amount due on the policy.

As said by the court in *Sweetser* v. *Odd Fellows, etc., Ass'n, supra,* forfeitures are not favored in law, and such continued course of dealing between the insurer and the insured as would lead the insured to honestly believe that the dues would be accepted within a reasonable time after the same became due, and if paid within such reasonable time, no forfeiture would be declared, the company would be estopped from declaring a forfeiture within a reasonable time after the dues became payable, and the policy would continue in force during that time.

As we have stated, while but a short time had elapsed since the issuing of the policy, yet the monthly dues for each month during the time the dues had been accepted after the expiration of the days of grace, and no forfeiture had been declared, and in addition thereto an agent of the association, having authority to do all acts and things necessary to build up the interest and defend the rights of the association, had waived the right to declare a forfeiture, and to have the December dues paid within the time fixed for the payment of the same. It is clearly for the benefit of the company to continue the policies in force, and to have the dues paid by the insured. The authority of the agent, Joseph, was a general authority.

We have considered the case on the theory that section 33 of the by-laws, fixing the time for payment of dues and providing for a forfeiture in case of non-payment, was introduced in evidence and is properly in the record, although this is denied by counsel for appellant, they insisting that this sec-

tion was not introduced in evidence, while counsel for appellee insist that it was put in evidence, and refer to an agreement between counsel to the effect that so much of the by-laws as either party cared to use might be considered in evidence; but section 33 does not seem to have been offered in evidence, nor does it appear that either counsel made known their desire to use said section during the trial, but even treating the section as having been put in evidence, we regard the evidence as supporting the verdict. If, however, the section is not in evidence) and we are inclined to think that it is not), then there is nothing in the record showing any right on the part of the appellee to declare a forfeiture prior to the death of the assured.

Counsel for appellee assigned as reasons for a new trial the admission of certain evidence given by one H. B. McCune, a witness, in answer to questions 14, 15 and 16 propounded to him, in answer to which he testified to what Mr. Morrison, the president of the association, said relating to the payment of the December instalment of dues.

The witness, Mr. McCune, was the administrator of the estate of Mr. Painter, deceased, and took the policy and called on Mr. Morrison, the president, at the solicitation of the widow, the appellant, in reference to the payment of the policy, and said to him that Mr. Joseph had called on Mr. Painter for the dues, and Mr. Morrison and the witness argued the case as to whether it would be right for Mr. Morrison to pay the policy or not, and as to Mr. Joseph going to see Mr. Painter, and wanting to take the money from him and send him a receipt. And the witness testified further that his recollection was that Mr. Morrison said that the money would have been received, and that Mr. Morrison told the witness that it was the duty of the agent that solicited the person who was assured to look after and take care of their interest in the policy.

There was no error in the admission of this evidence when taken in connection with the other facts in the case, that

Joseph was the agent who solicited this insurance, the dues for each month were paid and accepted after the expiration of the days of grace, and the general authority of the agent Joseph to do such acts as were for the benefit of the association. It tended to show that Joseph not only had authority to act in the capacity which he did, but that it was regarded by the president, the principal officer of the company, as a part of the duty of Joseph to look after policy-holders and endeavor to have them to pay up their dues, and as showing a willingness on the part of the president to have accepted payment of the dues after the expiration of the days of grace, and showing a lack of disposition on the part of the president to declare a forfeiture on failure to pay dues within the time fixed.

The conclusion we have reached is that the superior court in general term erred in reversing the judgment at special term.

The judgment is reversed, at costs of appellee, with instructions to the superior court to affirm the judgment at special term.

Filed March 31, 1892.

No. 15,666.

131 76
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Cully *v.* Shirk, Executor, et al.

Jurisdiction.—*Action to Set Aside Judgment.— When Does not Lie.*—A defendant can not maintain a separate and independent action to set aside a judgment, on the ground that it was taken against him by default and without notice, where the return of the sheriff to the summons shows that he was served by copy thereof left at his "last and usual place of residence," and there are no charges of fraud on the part of the plaintiff or the officer, and no allegations of a defence, in whole or part, to the cause of action stated in the complaint. *Nietert* v. *Trentman*, 104 Ind. 390, *Dobbins* v. *McNamara*, 113 Ind. 54, and *Cavanaugh* v. *Smith*, 84 Ind. 380, distinguished.

Judgment.—*What is a Collateral Attack Upon.*—Any attack upon a judgment for want of jurisdiction in the court which rendered it, predicated upon matter *dehors* the record, is a collateral attack.

From the Adams Circuit Court.

J. T. France and *J. T. Merryman,* for appellant.

P. B. Manley and *E. E. Friedline,* for appellees.

Miller, J.—This action was brought by the appellant against the appellees to set aside, vacate and declare null and void a judgment and decree of the Adams Circuit Court, rendered against her, in an action to foreclose a mortgage, and to cancel a sheriff's deed, executed in virtue of the judgment and decree.

The judgment is assailed upon the ground that the court was without jurisdiction of the person of the defendant. The complaint alleges that "she never had, at any time, any notice of any kind whatever of the filing of said complaint or the pendency of said action; that the return of said sheriff on said summons, wherein he states that he left a true copy of said summons at the last and usual place of residence of this plaintiff, is wholly false; that no copy of summons or process of any kind in relation to said cause was ever left at the residence of this plaintiff or served on her in any manner whatever; that she never appeared to said cause, in said court, voluntarily or otherwise, and never in any manner submitted herself to its jurisdiction in said action."

This was not an application, under section 396 of the code, to be relieved from a judgment taken against her, through her mistake, inadvertence, surprise or excusable neglect; but was simply a suit to have the judgment set aside, upon the ground that the return of the sheriff, showing that a summons had been served upon her, was untrue; that she never had been served with process, and that, therefore, the court was without jurisdiction of her person when the judgment was rendered.

There is no claim that the defendants in the action of foreclosure had a meritorious defence, or that the proceedings were not proper and regular upon their face.

The appellees answered this complaint by a general denial. The cause was tried by the court, and, upon request, a special finding of the facts and conclusions of law were returned. The conclusion at which we have arrived, upon the effect to be given to the return of the sheriff, in this class of actions, renders it unnecessary to set out at length the finding of facts and conclusions of law.

The court found that the summons issued in the foreclosure suit was returned by the sheriff with this endorsement:

"Came to hand this 7th day of April, 1888. Served as commanded by leaving a true copy of this writ at the last and usual place of residence of Elizabeth Cully, this 11th day of April, 1888. PERRY H. LAWTON.

"By J. S. McLeod, Deputy."

This return was regular upon its face, and was such as to fully authorize the court to assume jurisdiction of the person of the defendant. The proceedings of the court, subsequent to that time, appear to be regular. There is no pretence that there was any fraudulent conduct on the part of either the plaintiff or the officer in the service or return of the summons, or that the defendant was not a resident of the county.

Such being the case, we are of the opinion that the return by the sheriff of the service of the process was binding and conclusive upon the parties to the suit, and that neither of them can, as against the other, be permitted to dispute its verity.

In *Nietert* v. *Trentman*, 104 Ind. 390, it was held by a divided court, that in a proceeding under section 396, R. S. 1881, to set aside a default and be relieved from a judgment taken against a defendant who had a meritorious defence, but was prevented from appearing in time to make his defence by "his mistake, inadvertence, surprise or excusable

neglect," the defendant might, for the sole purpose of showing a sufficient reason for not appearing and making defence, show that the summons was not, in fact, served upon him.

In the opinion overruling the petition for a rehearing, ZOLLARS, J., said:

"He can not dispute the service for the purpose of assailing the judgment as void, nor of disputing the jurisdiction of the court over him; he can not do this by reason of the rule invoked by appellees. That rule says, that for the purpose of jurisdiction the return of service by the officer is conclusive, although, in fact, there may have been no service."

This case is not within the exceptions to the general rule that the return of a sheriff is conclusive between the parties, as declared in that case, and we certainly do not desire to go any farther in that direction.

The appellant cites and relies upon the case of *Dobbins* v. *McNamara*, 113 Ind. 54. In that case the complaint alleged that the defendant was not a resident of the county where he was returned as served by copy left at his last and usual place of residence; that he never made his home, or even stayed over night, at the house where the copy was left, and it also alleged that he was not at that time within the jurisdiction of the court in which the action was pending. In connection with these allegations, it was averred that the pretended service and return to the summons was procured by the fraud of the attorney of the plaintiff.

The distinction between the cases is marked and important. The elements of fraud and the non-residence of the defendant, lacking in this case, were in that case controlling. A similar case is that of *Cavanaugh* v. *Smith*, 84 Ind. 380.

We have considered this case upon the ground assumed by the parties, that the attack upon the judgment was direct, and not collateral. The converse of this rule seems to be established by the later cases, and the general rule is laid down that any attack upon a judgment for want of jurisdiction in the court to render it, predicated upon a matter de-

hors the record, is collateral. *Harman* v. *Moore*, 112 Ind. 221; *Cain* v. *Goda*, 84 Ind. 209; *Lantz* v. *Maffett*, 102 Ind. 23; *Earle* v. *Earle*, 91 Ind. 27; *Indianapolis, etc., R. W.* v. *Harmless*, 124 Ind. 25.

Judgment affirmed.

Filed March 31, 1892.

No. 15,658.

HALE *v.* MILLER.

APPEAL.—*Proceedings Supplemental to Execution.—Separate Trials.—Parties on Appeal.*—Where several persons are made parties to a proceeding supplemental to an execution, there is no right to separate trials; and if a joint judgment is rendered against the defendants, the one appealing must make the remainder parties to the appeal.

From the Miami Circuit Court.

J. M. Brown and *N. N. Antrim*, for appellant.

J. L. Farrar and *J. Farrar*, for appellee.

ELLIOTT, C. J.—The appellant was one of several parties to proceedings supplemental to execution, and joined with his co-parties in a plea in abatement, alleging that there was another action pending at the time these proceedings were commenced. To the plea in abatement the appellee responded, admitting that such an action was pending, and averring that it was dismissed on the first day of the term. This response to the plea was probably insufficient, inasmuch as the pendency of the former action at the time these proceedings were commenced was a sufficient ground for a plea in abatement. *Lee* v. *Hefley*, 21 Ind. 98. But we do not think the appellant is in a situation to make available the error in holding the reply to the plea good, as the exception was a joint one, as was the plea, and he alone appeals and assigns error, not

making his co-parties in the court below parties to the appeal.

Where several persons are made parties to a proceeding supplemental to execution there is no right to separate trials.

A special finding was not requested, nor is there a special finding in the record, so that there is no foundation for the appellant's complaint that the court erred in not specifically finding a designated fact. If it were conceded that the reason stated is one known to the law, there is no foundation for it.

We can not disturb the finding upon the evidence.

Judgment affirmed.

Filed April 1, 1892.

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131 81
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No. 16,524.

Ex Parte Sweeney.

Appeal.—*In Term.*—*Bond.*—The filing of a bond is an essential step in perfecting a term appeal, and where a bond is not filed within the time limited by the order granting the appeal, the appeal must be on notice.

By the Court.—The petition of the clerk asks us to decide whether the filing of a bond is essential to the effectiveness of an appeal in term. We adjudge that the filing of a bond is an essential step in perfecting a term appeal, and that where a bond is not filed within the time limited by the order granting the appeal, the appeal must be upon notice. This doctrine has been asserted in many unreported decisions, made upon motions, and is declared in *Holloran* v. *Midland R. W. Co.*, 129 Ind. 274. See, also, 2 Works Pr. Sec. 1090; *June* v. *Payne*, 107 Ind. 307; *Goodwin* v. *Fox*, 120 U. S. 775; *Webber* v. *Brieger* (Col.), 27 Pac. Rep. 871). In *Jones* v.

Droneberger, 23 Ind. 74, and in *Ham* v. *Greve*, 41 Ind. 531, there are intimations of a contrary doctrine, but there was no authoritative decision upon the question. The failure to file a bond does not, however, prevent an appeal upon notice. As held in *Burt* v. *Hœttinger*, 28 Ind. 214, a bond is not always essential to an appeal; but, as held in *Holloran* v. *Midland R. W. Co.*, *supra*, where there is no bond, notice is required. A bond is, we may add, not essential to the appeal, although it is necessary to obtain a supersedeas, where notice is given.

Filed March 31, 1892.

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131 82 | 147 648 | 131 82 | 150 401 | 131 82 | 161 248

No. 14,489.

The Indianapolis Union Railway Company v. Boettcher.

Negligence.—*Negligent Use of Locomotive Whistle.—Frightening Horse which Throws and Injures Plaintiff.*—The ordinary use of a locomotive or engine, and the ordinary sounding of its whistle and escape of steam is not negligence; but the negligent and careless sounding of the whistle and blowing off of steam in such a way as to cause it to make an unusual noise, whereby the plaintiff's horse, which he is riding, throws and injures him, is actionable negligence.

Same.—*Wilful Injury.—What is.—Contributory Negligence.*—Where an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury is not negligently, but wilfully inflicted; and when the injury sued for is alleged either in terms or in substance to have been wilfully or purposely committed, contributory negligence is no defence.

Same.—*Evidence of Locality of Injury.*—The plaintiff may show the nature and surroundings of the place where the injury was inflicted.

Same.—*Degree of Caution.—Anticipating Injury.*—More vigilance and caution are required in the performance of acts at a place where injury is liable to occur from their performance than where no injury may be anticipated.

Same.—*Evidence of Gentleness of Horse Before and After Accident.*—Where it was sought to show that the horse frightened by the blowing of a steam

whistle was at the time gentle, the admission of testimony of former and prior use, and that he was always gentle at such times, even though it were inadmissible, is harmless error.

SAME.—*Instructions.*—For what are proper instructions in the case, see opinion.

From the Marion Superior Court.

F. Winter, *A. Baker* and *E. Daniels*, for appellant.

W. W. Woollen, for appellee.

OLDS, J.—This action was brought by the appellee against the appellant for damages alleged to have been sustained on account of the negligence of the agents and servants of the appellant.

Numerous errors are assigned and discussed. The first alleged error discussed is the overruling of appellant's demurrer to the first paragraph of the appellee's complaint.

Omitting the formal allegations of the complaint, it alleges: "That, on the 30th day of November, 1885, he, the said plaintiff, was then passing on and upon a certain public street and highway which intersects said Hadley avenue at or near the point where said Belt Railroad crosses the said avenue, and which street and highway runs in a southwesterly direction to said stock yards, and parallel with said switch and side-tracks; that at said time he was using all diligence on his part to manage his horse well and avoid any accident, and was not guilty of any negligence whatever; that the horse which he was riding was gentle and docile; that at said time the defendant, by its agents, had and was in possession, control, and had the management of a certain locomotive engine which was upon said switch and side-track; that said defendant, by its agents and servants, well knowing that the plaintiff was passing upon said street and highway, and not regarding its duty in that respect, so carelessly and negligently ran and managed the said locomotive engine as to cause and suffer it, by blowing its whistle, the blowing off of its steam, and suffering its steam to escape from it, to make loud and unusual noises, and thus frighten the horse

which the plaintiff was riding, and causing him to become unmanageable, and to thus throw this plaintiff from off his back to the ground, and thereby breaking plaintiff's leg and bruising his body in divers places."

It is contended that the paragraph of complaint does not allege any acts of negligence for which appellant is liable to respond in damages; that the appellant, upon its own grounds, has the lawful right to sound its whistle and to blow off its steam, and suffer its steam to escape, and that such acts are not *per se* negligent, and that these are the acts with which the appellant is charged with the commission of, and that no facts are alleged which would make the doing of such acts unlawful or the commission of them a nuisance.

Counsel for appellant are led into an error by the interpretation placed upon the language of the complaint. It is true, no doubt, that the blowing of the whistle and necessarily allowing steam to escape in the ordinary and usual way are lawful acts, and unless some peculiar facts or special circumstances are alleged making such acts specially dangerous and hazardous to others, which facts and circumstances are known to the employees operating the engine, whereby it would become their duty to refrain from sounding the whistle or allowing the steam to escape at the particular time and place, the company would not be liable for such acts; but a liability would no doubt attach to the wantonly and purposely blowing off of steam and blowing of the whistle at a time when such acts would in all probability cause an injury to others.

This paragraph charges that the appellee was on the street or highway in close proximity to the engine; that this fact was known to the employees operating the engine; "that they carelessly and negligently ran and managed said locomotive engine as to cause and suffer it, by blowing of its whistle, the blowing off of its steam, and suffering its steam to escape from it to make loud and unusual noises."

It does not charge the blowing of the whistle or letting

off of steam in the usual and ordinary way, but doing it in such a way and manner as to make "loud and unusual noises," and that it was such loud and unusual noises that frightened the horse; that the horse was gentle and docile, and the appellee was using all diligence to manage him, but that by careless and negligent management of the engine by blowing the whistle and blowing off the steam, and suffering the steam to escape in such a way as to make a loud and unusual noise, it frightened the appellee's horse and caused the injury.

The ordinary use of the engine, and the ordinary sounding of the whistle and escape of steam, is not negligence. What appellee complains of is the negligent and careless use of the engine, in disregard of the duty, in sounding its whistle and blowing off its steam in such a way as to cause it to make not the usual noise, but an unusual noise. The ordinary sounding of the whistle and allowing steam to escape is not negligence, and such use of the engine is not complained of, but the negligent use of the engine.

This paragraph of complaint is clearly sufficient to withstand a demurrer. *Billman* v. *Indianapolis, etc., R. R. Co.,* 76 Ind. 166; *Cincinnati, etc., R. W. Co.* v. *Gaines,* 104 Ind. 526; *Culp* v. *Atchison, etc., R. R. Co.,* 17 Kan. 475; *Favor* v. *Boston, etc., R. R. Co.,* 114 Mass. 350.

The next alleged error is the overruling of the demurrer to the second paragraph of the complaint.

This paragraph was intended to charge, and we think it does charge, a wilful injury. It charges "that the said defendant, by its agents and servants, well knowing that the plaintiff was passing along said street and highway, and not regarding its duty in that respect, but intending to injure the plaintiff, and do that which would result in his injury, so purposely, wilfully and recklessly ran and managed its locomotive engine which was upon said switch and side-track, as to cause it, by the blowing of its whistle and the blowing off

of its steam, to make loud and unusual noises, and thus to frighten the horse," etc.

This paragraph alleges that the agents and servants of appellant, intending to injure the plaintiff, purposely, wilfully and recklessly ran and managed the locomotive as to cause it, by, etc., to make loud and unusual noises, and thus to frighten the horse, etc. This charges the wilful and purposely doing of the acts which caused the injury, and makes the paragraph good as a charge of wilfulness. *Chicago, etc., R. R. Co.* v. *Hedges*, 105 Ind. 398; *Cincinnati, etc., R. R. Co.* v. *Eaton*, 53 Ind. 307; *Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301.

In this latter case it is held that when an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury ceases to be a merely negligent act and becomes one of violence and aggression, and that when the injury sued for is alleged, either in terms or in substance, to have been wilfully or purposely committed, contributory negligence ceases to be a defence. Error is assigned on the overruling of appellant's motion for judgment on the jury's answers to interrogatories, notwithstanding the general verdict.

There was no error in this ruling. We have carefully considered all of the interrogatories and answers thereto, and the facts found in answer to the interrogatories do not entitle the appellant to a judgment, notwithstanding the general verdict.

The answers to interrogatories show that the persons in charge of the engine allowed the steam to escape and blew the whistle at an unusual time, and negligently and wilfully blew the whistle. By the general verdict the jury found that the persons in charge of the engine either negligently or wilfully ran and managed the engine by blowing the whistle and blowing off steam and suffered the steam to escape so as to make loud and unusual noises, and thus frightened appellee's horse. There are no facts found in the an-

swer to the interrogatories controverting this or any other facts found by the general verdict.

It is next alleged that the court erred in overruling appellant's motion for a *venire de novo*, for the reason, as stated, that "the answers to the twentieth and twenty-first interrogatories show that the general verdict was based upon inconsistent causes of action, and that the general verdict included damages upon account of an injury which was not in the record. The same act was said by the jury to have been at once negligent and wilful." The act referred to is the blowing of the whistle. The answers to these interrogatories are not inconsistent, nor are they inconsistent with the general verdict. There is no finding that the whistle was blown but one time; for aught that appears from the answers to interrogatories the employees may have at one time negligently blown the whistle and at another they may have wilfully blown it, and at each time it may have been blown in such a way as to have made a loud and unusual noise. The motion for *venire de novo* was properly overruled. Indeed, if all was conceded that counsel claim, we do not think it would entitle the appellant to this remedy. Numerous questions are presented on the ruling on the motion for a new trial.

The appellee asked his witness, Owen Gray, the following question:

"I will ask you what amount of travel there is over Hadley avenue right at that point." The appellant objected to the question, for the reason "that the complaint did not count upon any condition of the tracks at the crossing, or upon any negligent conduct of the defendant at the crossing, or upon any negligent use of the crossing by the appellant." The court said to appellee's attorney: "You mean at the crossing?" Counsel answered: "I wish to show that right at that point, within 75 or 100 feet of where this engine stood, on Hadley avenue, there is perhaps as much or more travel than on any other street that leaves this city,

and also that on Exchange avenue hundreds of men pass over it going to the stock yards." The court said: "You may show that."

This ruling was proper. It was clearly permissible for the court to allow the appellee to show the nature and surroundings of the place where the accident occurred. What may have been careless or gross negligence under some circumstances, might not be under others. More vigilance and caution are required in the doing of acts at a place where injury is liable to occur from them than where no injury may be anticipated from the doing of them.

The appellee was being examined as to the character of the horse, and was asked as to his use of the horse before the accident and since up to the trial.

Counsel for appellant objected to the questions relating to the use of the horse subsequent to the accident. The court overruled the objection. It was sought to be shown that the horse was a gentle horse at the time, and the fact that he had used him before and after that time was proper, at least it does not constitute such error as to justify a reversal of the judgment, as certainly no harm could result from the witness saying he had used the horse since, and he had acted all right.

No good would result from a discussion of the evidence. We think there is sufficient evidence to support the verdict.

The giving of the second, seventh and eighth instructions is alleged as error. The second construes the second paragraph of complaint as charging wilfulness, and in this there was no error.

The seventh instruction is as follows:

"*Seventh.* If you find that the agents and servants of the defendant, at the time of the alleged injury, seeing the plaintiff as he was about to approach the crossing, could have avoided any injury by the exercise of even ordinary care, but disregarding their duty in that respect, recklessly and purposely caused the whistle to sound or the steam to be

blown off, on and from the locomotive engine, intending to injure the plaintiff or to frighten his horse, or under such circumstances as imply a willingness to inflict injury or to disregard human life, you may find that such injuries (if any were committed) were wilfully and wantonly done, and in such case the plaintiff could recover, even though he were himself negligent in his own conduct at the time: provided that such agents and servants were in the regular course of their employment by the defendant at such time and in the line of their business."

There was no error in the giving of this instruction, taken in connection with the other given. *Pennsylvania Co.* v. *Smith*, 98 Ind. 42.

By the eighth instruction the jury were told that "if an injury came to the plaintiff by his horse merely becoming frightened at the locomotive while standing on the track, however close to the highway, that had become stationary for a few minutes before, and making no loud and unusual noises, there could be no recovery for such injuries; under such circumstances the locomotive could not in law be considered an object likely to frighten reasonably gentle horses. And in order, under such circumstances, to make it such an object of danger to travel it would have to be shown that in its use and management some act was done which caused its machinery to make noises, emit smoke or steam, in a way and to a degree that would, under the circumstances, amount to carelessness and negligence."

There was no error in the giving of this instruction, and it was as favorable to the appellant as it was entitled to have given.

There is no error in the record.

Judgment affirmed, with costs.

Filed Oct. 15, 1891; petition for a rehearing overruled March 15, 1892.

DISSENTING OPINION.

COFFEY, C. J., and MILLER, J.—We regret our inability

to concur in the opinion in this case. In our opinion the first paragraph of the complaint does not state facts sufficient to constitute a cause of action. As the court below overruled a demurrer thereto, the judgment, we think, should be reversed for the error thereby committed.

Filed Oct. 15, 1891.

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No. 16,485.

THE STATE, EX REL. DAYTON GRAVEL ROAD COMPANY ET AL., v. THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

MANDAMUS.—*County Commissioners.*—A writ of mandate will not issue against a board of commissioners, when acting in a judicial capacity, to direct the performance of a judicial duty in any particular mode or to render any particular judgment.

SAME.—*Purchase of Gravel Road.*—Where the board of commissioners submits to the voters of a township the question of the purchase of a gravel road, and the election results in favor of the purchase, but the board refuses to make an order for such purchase, mandamus will not lie to compel the board to make such order, as in such a case the board acts judicially.

SAME.—*Adequate Legal Remedy.*—Mandamus will not lie where the party applying for the writ has an adequate legal remedy. The right of appeal is an adequate legal remedy, within the meaning of this rule.

From the Tippecanoe Circuit Court.

A. Rice, *W. S. Potter*, *J. R. Coffroth* and *W. R. Coffroth*, for appellants.

J. B. Milner, *J. M. La Rue*, *D. P. Vinton* and *H. H. Vinton*, for appellee.

COFFEY, J.—This was a suit in the Tippecanoe Circuit Court, by the appellant against the appellee, to compel the latter, by mandamus, to complete the purchase of the toll-road therein described. The court sustained a demurrer to the

petition, and the propriety of this ruling is presented for our decision. So much of the petition as is necessary to an understanding of the questions involved is, substantially, as follows:

The relator, the Dayton Gravel Road Company, is a gravel road corporation, duly organized under the laws of the State of Indiana, and has been such for more than twenty years last past, and was at and before the 15th day of October, 1890, and for more than twenty years theretofore, the owner, and in the possession of a line of gravel road lying and being situate in the townships of Fairfield, Wea and Sheffield, in said county. Said gravel road was, at the time aforesaid, and still is, a toll road. On the 15th day of October, 1890, there was presented to the defendant, * * then in special session, a petition signed by more than fifty freeholders and citizens of said townships of Fairfield, Wea and Sheffield, wherein said gravel road is located, representing to said board that said gravel road is a toll road, and asking said board to submit to the voters of said townships the question of purchasing said gravel road, and to take the necessary steps provided by law for holding an election by the voters of said respective townships as to whether said gravel road should be purchased.

At the time of presenting the petition the relator Jacob Benton was a citizen, freeholder, and taxpayer of Sheffield township, and the relator William S. Potter was a citizen, freeholder and taxpayer of Fairfield township, and they yet so remain.

Acting on said petition the board, on the 15th day of October, 1890, appointed Henry D. Miller, on behalf of the board, Francis Acheson, on behalf of the gravel road company, and Everett B. Vawter, the surveyor of Tippecanoe county, viewers, to view said road and determine the consideration to be paid for the same.

On the 8th day of November, 1890, they made their report to the board, then in special session, in which they des-

cribed the road as the same is described in this petition, and fixed the consideration to be paid therefor at the sum of ten thousand dollars.

On the 19th day of November, 1890, the board submitted to the gravel road company an offer to purchase said road for that sum, and required it to accept or reject, in writing, said offer, on or before the last day of the December term of the board; and on the 13th day of December, 1890, the gravel road company did accept said offer, and filed its written acceptance thereof with said board; and thereupon the board ordered a special election to be held in the townships of Fairfield, Wea, and Sheffield, on Saturday the 24th day of January, 1891, by the voters of said townships, at which election it was ordered there should be submitted to the voters of each of said townships the question of purchasing said gravel road, for the consideration above stated. It is alleged that the proper and legal notice of said election was given; that the election was held on the day named, resulting in a majority of six hundred and sixty in favor of the purchase of said road, which vote was duly certified to the board by the proper election officers; that on the 29th day of January, 1891, the gravel road company tendered to the board a deed for said gravel road, and at that time said road company was not indebted to any person; that thereafter, to wit, on the 3d day of February, 1891, the board, when in special session, then and there refused to make an order for the purchase of said toll and gravel road, and to issue the bonds of the county therefor to said company, and so entered such refusal upon its records.

Prayer for a writ of *mandamus* requiring the board of commissioners to make an order to purchase said road, and to issue to the relator, the Gravel Road Company, bonds of the county, dated February 3, 1891.

It is earnestly insisted by the appellee that the appellants have mistaken their remedy, and that the facts set up in the

petition do not make a case authorizing a resort to the extraordinary remedy of *mandamus.*

It seems to be settled, in this State, that the writ will not issue against a board of commissioners, when acting in a judicial capacity, to direct the performance of a judicial duty in any particular mode or to render any particular judgment. Where a board of commissioners refuses to act, however, in a matter upon which it is their duty to take some action, the writ will issue to compel action, but will not dictate the kind of judgment to be rendered. *State, ex rel.*, v. *Board, etc.*, 45 Ind. 501; *State, ex rel.*, v. *Board, etc.*, 63 Ind. 497.

The rule is stated by Mr. High, in his work on Extraordinary Legal Remedies, section 152, as follows: "But the most important distinction to be observed in administering relief against inferior courts, is, that while they may be compelled by *mandamus* to act, when they have refused to proceed, the writ being regarded as the most fitting remedy to set them in motion, yet it will in no case command the inferior tribunal how to act, nor indicate any specific judgment which it shall render. In other words, while *mandamus* is regarded as the appropriate remedy to set the machinery of the courts in motion, it will not control their motion, or direct the performance of any particular judicial act."

There is, perhaps, a class of cases, such as *Wood* v. *Strother*, 76 Cal. 545, and cases of a similar character, where the determination of the officer against whom the writ issued was not intended to be final, in which such officer may be compelled by *mandamus* to act in a particular way, even though he is exercising powers in their nature judicial; but in our opinion, this case does not belong to that class. A board of county commissioners, in this State, when acting judicially, is a court. In the matter of determining the sufficiency of the petition to purchase a toll road, and in determining the sufficiency of the notice of the election, the regularity of the election, in canvassing the vote, and declaring the result, investigating and passing upon the title of the person, or

company, to the road which is the subject of purchase, and in determining that such steps have been taken as authorizes it to complete the purchase, the board acts judicially. *Gilson* v. *Board, etc.*, 128 Ind. 65.

The board of commissioners of Tippecanoe county, presumably, after a full and fair consideration of all the matters connected with the proceeding having in view the purchase of the toll road described in the complaint, have reached a conclusion adverse to the petitioners, and have refused to grant their prayer.

This conclusion has been entered of record. Upon what they based their conclusion we are not informed, nor do we think it is necessary that we should know. It is sufficient for us to know that, in a matter involving a judicial investigation, it has reached, and has entered of record, a conclusion upon the merits of the controversy. Whether such conclusion was correct or erroneous is immaterial, for, the board of commissioners being a court, invested by law with power to pass upon the questions involved, it can not be compelled, by mandamus, to render a different judgment. *White* v. *Burkett*, 119 Ind. 431.

For another reason the court did not err, in our opinion, in sustaining a demurrer to the petition before us. It is well settled that a proceeding by *mandamus* will not lie where the party applying for the writ has an adequate legal remedy. *Marshall* v. *State, ex rel.*, 1 Ind. 72; *Board, etc.*, v. *Hicks*, 2 Ind. 527; *State, ex rel.*, v. *Board, etc.*, 25 Ind. 210.

The right of appeal is an adequate legal remedy, within the meaning of this rule. *State, ex rel.*, v. *Board, etc.*, *supra*; *White* v. *Burkett*, *supra*.

As the board of commissioners of Tippecanoe county acted in the matter of the petition for the purchase of the toll road in question, in a judicial capacity, the parties claiming to be aggrieved by its final action had the right to appeal therefrom to the circuit court. *Grusenmeyer* v. *City of Lo-*

gansport, 76 Ind. 549; *Platter* v. *Board, etc.*, 103 Ind. 360; *City of Logansport* v. *La Rose*, 99 Ind. 117; *Padgett* v. *State*, 93 Ind. 396.

Judgment affirmed.

Filed April 2, 1892.

No. 15,300.

McCANN, TRUSTEE, v. THE FIRST NATIONAL BANK.

NATIONAL BANKS—*Assets Held in Trust.—For What Purpose.*—The assets of a bank are held in trust: 1. For the payment of its indebtedness. 2. For the distribution among the stockholders of the surplus only, if any, after the payment of such indebtedness.

SAME.—*Withdrawal of Assets — When Can Not be Done.*—There can be no voluntary withdrawal of any portion of the assets of a bank, where the effect of such withdrawal will be to impair the capital stock, or endanger the security of its creditors. Where the capital stock of a bank is reduced to meet an impairment, and to escape an assessment by the controller of the currency, there can be no withdrawal of depreciated securities which caused the impairment.

From the Clark Circuit Court.

D. W. Sanders, *F. B. Burke*, *F. T. Fox* and *L. T. Michener*, for appellant.

J. K. Marsh, *A. P. Humphrey* and *G. M. Davie*, for appellee.

McBRIDE, J.—This case grows out of the transaction which was very fully considered by this court in *McCann* v. *First Nat'l Bank*, 112 Ind. 354.

The capital stock of the First National Bank of Jeffersonville was originally $300,000. The borrower of a large amount of money became insolvent, and certain collaterals

held to secure the loan also became apparently worthless. To avoid an assessment by the comptroller of the currency to make good an impairment of the capital stock, thereby occasioned, to the amount of $75,000, the stockholders of the bank, acting under the provisions of section 5143, United States Revised Statutes of 1878, reduced the capital stock to $225,000.

At the meeting where this action was taken the stockholders voted to take the depreciated assets, which were the cause of the impairment, from the assets of the bank, and place them in the hands of trustees, for the use and benefit of the stockholders.

The appellant was named as one of the trustees.

The officers of the bank ignored this action by the stockholders, and retained the securities in question in their possession. They subsequently appreciated in value, and the bank realized on them $83,000.

This suit was by the appellant, as such trustee, to recover said sum.

The averments of the complaint are sufficient, if the trust which the stockholders thus attempted to create was valid.

The conclusions reached in *McCann* v. *First Nat'l Bank*, *supra*, are, we think, decisive here. The very full consideration given that case enables us to dispose, briefly, of the case at bar.

It must be remembered that the reduction in the capital stock of the bank was, in a sense, involuntary, and was to meet an impairment of equal amount. It must be presumed that the comptroller of the currency, in estimating and determining the amount of the impairment, considered all of the assets of the bank, and that his estimate was based upon what there appeared to be their value, making proper allowance for assets depreciated in value, and for those regarded as valueless.

The assets of a bank are held by it in trust: 1. For the payment of its indebtedness, and, 2. For the distribution

among the stockholders of the surplus only, if any, remaining. Morse Banks and Banking, section 706.

Conceding, without deciding, that the stockholders of a national bank, the capital stock of which is intact, may voluntarily reduce its capital stock under the statute, for the purpose of withdrawing a portion of the investment, and may thereupon withdraw assets to an amount equalling the reduction, the question remains, can they take such action when the reduction is involuntary, and is only made to an amount equalling an impairment in its capital? The right to withdraw assets, in the one case, would not necessarily involve the right to do so in the other. In the one case the reduction in the amount of its stock is made for the purpose of releasing and withdrawing a portion of the investment. In the other it is made because it is discovered that a corresponding amount of the investment has been lost, and thus already involuntarily withdrawn.

There can be no voluntary withdrawal of any portion of the assets of a bank, where the effect of such withdrawal will be to impair the capital stock, or endanger the security of its creditors.

On the facts before us it will be presumed that the reduced capital stock represented the actual value of the remaining assets. *Prima facie*, any further withdrawal of assets, whether of great or of little value, would result in still further impairment of the capital. In our opinion the stockholders had no power to withdraw the assets in question, and no valid trust was created by the attempt to do so.

We purposely limit our decision to this one question, which is, of itself, amply sufficient to vindicate the action of the trial court. For this reason we express no opinion upon the other questions suggested.

Judgment affirmed.

Filed April 5, 1892.

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171 346

No. 15,687.

AYERS ET AL. v. HAMILTON.

CONTRACT.—*Extension of Time.*—*Forbearance to Sue.*—An agreement to extend the time of payment of a debt for a limited period of time, even if founded upon a sufficient consideration, is, in substance, an agreement not to sue within that time, and can not be pleaded in bar of an action brought within that time. The only remedy for the violation of such an agreement is an action for damages.

From the Rush Circuit Court.

W. A. Cullen and *J. D. Megee*, for appellants.

J. A. New and *H. E. Barrett*, for appellee.

MILLER, J.—This was a suit brought by the appellee to foreclose a mortgage.

Two errors are assigned and discussed in the briefs of counsel:

1st. That the court erred in sustaining a demurrer to the first paragraph of answer.

2d. That the court erred in overruling the appellants' motion for a new trial.

The first paragraph of answer counted upon a written agreement extending the time for the payment of the note, secured by the mortgage in suit, to a period subsequent to the time of the bringing of this action.

This agreement was a mere contract of forbearance, executed long after the maturity of the note.

It is well settled that an agreement to extend the time of payment of a debt for a limited period of time, even if founded upon a sufficient consideration, is, in substance, an agreement not to sue within that time, and can not be pleaded in bar of an action brought within that time. The only remedy for the violation of such an agreement is an action for damages. *Vogel* v. *Harris*, 112 Ind. 494; *Williams* v. *Scott*, 83 Ind. 405; *Mills* v. *Todd*, 83 Ind. 25; *Irons* v. *Woodfill*, 32 Ind. 40.

The question discussed under the second assignment of error is the alleged insufficiency of the evidence to sustain the finding and judgment.

We have read the evidence and find that it is conflicting upon every issue joined in the pleadings. We can not, therefore, disturb the judgment on this account.

Judgment affirmed.

Filed April 5, 1892.

No. 15,619.

O'BRIEN ET AL. *v.* MOSS ET AL.

SCHOOLS.—*Teacher, Vote of District Not to Employ.—Enjoining Trustee Insisting on Employing Such Person.*—A trustee of a township has no power to employ any teacher for a school whom a majority of those entitled to vote at a school meeting of such school have decided, at any regular school meeting thereof, they do not wish employed; and the patrons of such school may, by injunction, prevent such trustee employing as teacher a person whom they have thus decided they do not desire.

SAME.—*Appeal from Trustee to County Superintendent.—Finality of Decision.—Injunction.*—The decision of a county school superintendent, on appeal from a trustee, that a certain person shall not be employed, over the protest of the patrons of a school district, is final and binding upon such trustee; and obedience thereto may be compelled by injunction.

SAME.—*Refusal of Trustee to Decide.—Right of Appeal.*—The refusal of a trustee to decide a matter properly presented to him can not prevent the person asking a decision appealing the matter so submitted to him to the county school superintendent; for the refusal of the trustee to decide is a decision against the person who made the request for a decision.

SAME.—*Construction of Statute, Rights of School Patrons.*—A statute declaring the right of taxpayers of a school district to declare who shall be the teacher of their children must be construed liberally so as to advance such right, and is not to be so construed as to hamper or destroy it.

From the Clay Circuit Court.

W. W. Carter and *J. A. McNutt*, for appellants.

C. E. Matson and *P. T. Luther*, for appellees.

Elliott, C. J.—The appellees allege in their complaint that they are resident voters and taxpayers of school district No. 3 in Sugar Ridge township, Clay county; that on the 23d day of June, 1888, at a regular school meeting in the school district, the taxpayers, parents and guardians of children enumerated in the district decided that they did not wish the appellant O'Brien employed as a teacher; that notice of this decision was given to O'Brien and Fernsel, the trustee; that Fernsel disregarded the decision and employed O'Brien; that, on the 8th day of October, 1888, the appellees and others gave notice to O'Brien that they would require Fernsel to decide the question of the former's right to teach the school; that on that day they presented to Fernsel the question for his decision; that Fernsel refused to consider or decide it; that the parties thereupon gave notice to Fernsel and O'Brien that they intended to appeal from the action of Fernsel to the county superintendent of schools, and that they would present the matter to the superintendent on the 13th day of October, 1888; that the matter was presented to the superintendent on that day; that the superintendent gave it as his decision that Fernsel had no right or authority to employ O'Brien as a teacher; that the superintendent gave notice of his decision to Fernsel and O'Brien and directed the former to dismiss the latter; that the decision and direction of the superintendent were disregarded, and O'Brien was retained as a teacher; that the trustee threatens to continue O'Brien as a teacher, and will do so unless enjoined; and that O'Brien threatens to continue as a teacher, and has so continued. Prayer for injunction.

We shall consider only such objections to the complaint as counsel have presented, regarding, as the law requires us to do, all other objections as waived.

It is insisted that the delay in bringing suit is sufficient to defeat a recovery. We can not so adjudge. The objection

to the employment of O'Brien was made in June, 1888, and renewed on the 18th day of October; the decision of the superintendent was made on the 13th day of the same month, and the suit was commenced on the 7th day of January, 1889. The delay was not such as caused the appellees the loss of their right of action, for it was not an unreasonable one, nor was it such as to authorize the inference they had abandoned their right to sue. The question as it comes to us is not affected by the right or claim of O'Brien to compensation for the time he actually discharged the duties of a teacher, for the only question with which we have to deal is as to the right of the appellees to prevent him from discharging such duties.

The right of taxpayers of a school district to declare who shall be the teacher of their children is an essential element of the right of local self-government, and, therefore, one of high importance. A statute declaring such a right is one to be liberally construed to advance the right, and is not to be construed so as to hamper or destroy it. The right to declare who shall teach the children of a particular district is one which should reside in the parents and guardians of pupils, inasmuch as it is a salutary check upon the almost autocratic powers of the school trustee. The statute, construed by the aid of fundamental principles, is plain and explicit, indeed, it is so in its very terms. Thus it reads: "The said trustee shall not employ any teacher whom a majority of those entitled to vote at school meetings have decided, at any regular school meeting, they do not wish employed." But we need not, and do not, rest our decision upon the action of the school meeting alone, for there was an appeal to the county superintendent and a decision by him that the teacher must be dismissed. Taking the action of the school meeting and that of the superintendent together, as we must, there can be no doubt that the appellees' complaint is sufficient as against a demurrer. The

statute expressly provides for appeals from the decision of the trustee and declares that the decision of the superintendent, "of all local questions relating to the legality of school meetings, establishment of schools, and the location, building, repair, or removal of school-houses, or transfers of persons for school purposes, and resignation and dismissal of teachers, shall be final." Section 4537, R. S. 1881.

The silence and inaction of the trustee when called upon may well be deemed a decision adverse to those who demanded that he decide the question presented to him. A school trustee can not by inaction deprive taxpayers of their right to appeal. The refusal to decide, where there is a duty to decide, is a decision against those who duly prefer a request for a decision. It is certainly so in such a sense as to authorize an appeal. The appellees, therefore, had a right of appeal. They exercised that right and obtained a decision from an officer whose judgment is by law made final and conclusive. This doctrine has been asserted in closely analogous cases respecting the decisions of school officers.

It is assumed that the trustee and the superintendent were simply called upon to decide questions of law, but we find nothing warranting this assumption. The question was as to the right to employ a teacher, and while it is true that it is possible that such a question may involve matters of law it does not necessarily do so. We are not, however, to be understood as holding that the superintendent may not decide incidental questions of law involved in cases respecting the employment or dismissal of teachers, for the opinions of the superintendent of public instruction and of a learned attorney general are that he may decide such questions. Vories' School Law, 153. But, however this may be, it is clear that there is no reason for assuming that only questions of law were decided by the superintendent.

The facts stated in the special finding make a much stronger and better case for the appellees than the complaint

does, and we have no doubt that the judgment is right upon the merits.

Judgment affirmed.

COFFEY, J., did not take any part in the decision of this case.

Filed April 5, 1892.

No. 15,540.

LEWIS ET AL. *v.* ROWLAND.

INJUNCTION.—*Decree without Bond Being Filed.—Collateral Attack Upon.*—A decree granting an injunction without a bond being filed is at most only erroneous, and can not be collaterally attacked.

From the Fountain Circuit Court.

J. A. Lindley, V. E. Livengood, H. H. Dochterman, O. P. Lewis and *S. F. Wood*, for appellants.

T. F. Davidson and *A. Yount*, for appellee.

COFFEY, J.—This was an action by the appellants against the appellee, in the Fountain Circuit Court, to set aside a decree granting an injunction. It appears from the allegations in the complaint that at the April term of the Fountain Circuit Court the appellee, upon a trial, obtained a perpetual injunction against the appellants, enjoining them from using a certain livery stable, in the city of Covington, for the purposes named in the decree; that no injunction bond was filed by the appellee in said cause, but notwithstanding the appellants objected to the granting of such injunction they took no exception to the rulings and judgments of the court.

This action was commenced at a subsequent term, and proceeds upon the theory that the injunction decree is void, because it was granted without the filing of a bond. The court sustained a demurrer to the complaint, and this ruling presents the only question for our consideration.

It is insisted by the appellants that the court did not possess the power to grant an injunction until the bond provided for by statute had been filed, and that the decree, without a bond, is void.

This is a collateral attack upon the decree of the court granting the injunction sought to be set aside. Any proceeding to have a judgment declared void, on account of matters not appearing on the face of the record, is a collateral attack on the judgment. *Exchange Bank* v. *Ault*, 102 Ind. 322; *Harmon* v. *Moore*, 112 Ind. 221.

From anything appearing upon the face of the complaint, the decree which the appellants seek to set aside is silent as to whether a bond was or was not filed. In this state of the record we need not inquire, therefore, as to whether the statute contemplates the filing of a bond on a final hearing before the court can grant a perpetual injunction, unless the absence of the bond would render the decree void.

It has long been the settled rule in this State that the proceedings and judgment of a court of general jurisdiction are not subject to a collateral attack unless it appears on the face of the judgment that it is void. *Jarboe* v. *Severin*, 112 Ind. 572; *Hall* v. *Durham*, 109 Ind. 434; *Cassady* v. *Miller*, 106 Ind. 69; *State, ex rel.*, v. *Morris*, 103 Ind. 161; *Lantz* v. *Maffett*, 102 Ind. 23.

It is also a rule that where a court of general jurisdiction has jurisdiction of the subject-matter of the suit and of the parties, no judgment it may render within the issues is void, however erroneous it may be.

Assuming, as contended by the appellants, that a bond should have been executed before the injunction was granted, it does not follow that the decree was void. It was at most erroneous, and not subject to collateral attack.

In our opinion the court did not err in sustaining a demurrer to the complaint before us.

Judgment affirmed.

Filed Jan. 30, 1891; petition for a rehearing overruled April 5, 1892.

No. 15,656.

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148	555
131	105
148	512
152	457
152	458

Johnson, Receiver, *v.* McClary et al.

Partnership.—*Assets Used to Pay Individual Debts of Partners, Application of.—Insolvency of Firm.*—As between themselves, partners have the right to insist that partnership assets shall be first used for the payment of the firm's debts; but this right they may waive, and may transfer or encumber the firm property to pay or secure *bona fide* debts of the individual partners, for which the firm is not liable; and the transaction can not be successfully attacked either by a creditor or by a receiver of the firm appointed by reason of the insolvency of the firm.

Same.—*Lien of Creditors.*—Creditors of a partnership have no lien upon or special interest in partnership property, except through the rights of the partners.

Same.—*Transfer by One Member of Firm of Assets to Pay His Individual Debt.—Consent of His Partners.*—Without the consent of his partners, one partner can not transfer the assets of the partnership to the payment of his individual debt; and unless all the partners consent to or ratify such transfer, a receiver of the firm may follow and recover such assets, especially if they are essential to pay partnership debts.

From the Hamilton Circuit Court.

J. A. Roberts, R. R. Stephenson and *W. R. Fertig,* for appellant.

T. J. Kane and *T. P. Davis,* for appellees.

McBride, J.—The appellant, as receiver of an insolvent partnership, brought this suit to recover certain assets of the partnership, which he alleged one of the partners had, a short time prior to the appointment of the receiver, without the knowledge or consent of his co-partner, transferred to certain of his individual creditors to secure or pay his individual debt to them. The only question involved is the validity of the transfer. This arises on the evidence, in which there is no conflict. It is undisputed that the property was transferred to *bona fide* individual creditors of the partner making the transfer; that it was done only a short time before the appointment of the receiver, and after insolvency, although the parties did not at the time know of the

insolvency. It is also undisputed that the transfer was made without the knowledge of the co-partner, who was informed of it for the first time after it had been done. There is no evidence whatever showing either assent or dissent upon his part save such inferences as may possibly be drawn from the fact that eight days thereafter he asked for and secured the appointment of the receiver.

Partners have the right, as between themselves, to insist that the firm assets shall be used, first, for the payment of the firm debts. They may, however, waive this right, and may join in transferring or encumbering firm property to pay or secure *bona fide* debts of the individual partners, for which the firm is in nowise liable.

A transaction of this character, to secure *bona fide* debts, can not be successfully attacked, either by a creditor or by a receiver of an insolvent partnership. Partnership creditors have no lien upon or special interest in partnership property, save through the rights of the partners above referred to. *Trentman* v. *Swartzell*, 85 Ind. 443; *Warren* v. *Farmer*, 100 Ind. 593; *Fisher* v. *Syfers*, 109 Ind. 514; *Goudy* v. *Werbe*, 117 Ind. 154; *Purple* v. *Farrington*, 119 Ind. 164; *Dunham* v. *Hanna*, 18 Ind. 270; *Case* v. *Beauregard*, 99 U. S. 119; *Winslow* v. *Wallace*, 116 Ind. 317 (325).

Such use of firm property may no doubt be valid, although not joined in by all of the parties, provided it is done with their knowledge and consent, or is afterward ratified or approved by them.

The fact being established that the property transferred was firm property, transferred after insolvency to secure the individual debt of one partner, the burthen was on the appellees to show affirmatively either participation in or assent to the transfer by all the partners. This was essential to a successful defence.

The mere silence of the partner not joining in the transfer, when informed of it, is no doubt a fact proper to be

shown and considered as bearing on the question of assent. Such silence, however, which covers a period as short as that here involved of itself unaided by other facts, is not evidence of such assent. In our opinion the record contains no evidence whatever showing such assent.

There is an entire failure of evidence to sustain the finding of the court.

Judgment reversed.

Filed April 2, 1892.

No. 15,167.

Reeves et al. *v.* Grottendick et al.

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Municipal Corporations.—*Street Improvement in City.—Appeal.—How Transcript Construed.—Precept.*—By statute the transcript certified to the circuit court by the city clerk in an appeal from a street improvement, constitutes the complaint of the contractor; and it should not be construed with rigid strictness against him, and ought to stand, unless there is some defect in it which affects the substantial rights of the parties.

Same.—*Right of Appeal Statutory.*—The right to appeal from a precept is a statutory right; and there is no inherent right of appeal from it.

Same.—*Questions Tried on Appeal.—Legislature May Restrict.*—The Legislature has the power to declare what questions shall be tried on an appeal, and may preclude parties from litigating such as it may deem properly settled by the decision of the municipal officers.

Same.—*Questions Antecedent to Making of Contract.—Transcript, What Included.*—No question that reaches back of the time of the contract for street improvement can be litigated on an appeal from a precept; and no irregularity in the proceedings prior to that time can be drawn in question. The steps taken in the proceedings prior to that time need not be incorporated in the transcript. *Moberry* v. *City of Jeffersonville*, 38 Ind. 198, *McEwen* v. *Gilker*, 38 Ind. 233, and *Kretsch* v. *Helm*, 45 Ind. 438, held to be overruled.

Same.—*Affidavit for Precept Made by Only One Contractor.*—The affidavit of one of two or more joint contractors, to obtain a precept, is sufficient.

Same.—*Description of Lot Assessed.—Sufficiency of Affidavit as to.*—If the notice to the property-owner of the amount of the assessment contains a description of the property owned, and such notice is combined with

the affidavit for a precept, the latter need not contain a description of the lot against which it is desired to obtain a precept.

SAME.—*Sufficiency of Affidavit for a Precept.*—It is sufficient if the affidavit for a precept substantially conform to the statutory requirements; and it need not contain a recapitulation of all the steps that have been taken previous thereto in the proceedings. Section 3165, R. S. 1881. *Balfe* v. *Johnson*, 40 Ind. 235, and *Clements* v. *Lee*, 114 Ind. 397, distinguished.

SAME.—*Appeal from Several Precepts.*—*Some of Affidavits Insufficient.*—If there is a joint appeal from several precepts, and the several precepts are included in one transcript, and on such appeal the transcript is treated by the appellants as a single complaint, the overruling of a demurrer for want of facts is not an available error in the Supreme Court, even though some of the affidavits for precepts are defective.

SAME.—*Estimates of Costs, Engineer Makes.*—The city civil engineer is the proper officer to make the estimate and apportion the costs to each lot or tract of land.

SAME.—*Variance of Names of Contractors in Precept and Council Proceedings.*—A variance between the names of the contractors as set out in the precept and in the proceedings of the council is immaterial if it reasonably appears that one and the same person is meant.

SAME.—*Assessment.*—*What is Sufficient.*—*Allowing Credit on Former Void Assessments.*—If the estimate of the city civil engineer is adopted and approved by the common council, that is a sufficient assessment; and the fact that the resolution adopting the estimate provides that property-owners who have paid part of former assessments which have been vacated, does not impair the effectiveness of such assessment.

SAME.—*Assessment Void as to Other Property-Owners.*—The owner of property against which a precept to collect an assessment has been issued, can not object to its enforcement on the ground that assessments against neighboring lots are void.

SAME.—*Vacating Void Assessment.*—*Re-Assessment.*—*Name of Owner Not Given.*—If an assessment is void for not giving the name of the owner of the lot assessed, it may be vacated by the common council, and a new assessment made. A failure to state the name of a lot-owner correctly is sufficient to warrant a vacation of the asssessment.

LIEN.—*Payment.*—*Tender.*—To prevent a legal or equitable lien ripening into a title, the owner of the property must pay or tender the amount of the lien.

PRACTICE.—*Theory of Trial Court.*—*Appeal.*—The appellate tribunal will act upon the theory voluntarily assumed in the trial court.

SPECIAL VERDICT.—*When Sufficient.*—*Surplusage.*—A special verdict will be sustained if, after eliminating improper matters, it contains facts sufficient to sustain a judgment.

VENIRE DE NOVO.—*Object.*—*When Effective.*—A motion for a *venire de novo*

reaches matter of form, and is effective only when the verdict is materially defective.

From the Randolph Circuit Court.

W. D. Foulke, *C. H. Burchenal* and *J. L. Rupe*, for appellants.

C. C. Binkley, *E. L. Watson* and *J. E. Watson*, for appellees.

ELLIOTT, C. J.—Thirty precepts to enforce the collection of assessments levied for the cost of improving a street in the city of Richmond were issued against lots owned by the appellants. From these precepts separate appeals were prosecuted, but the trial court and the parties acted upon the theory that the appeals constituted a single case. The rule is that the appellate tribunal will act upon the theory voluntarily assumed in the trial court, and, under this rule, we shall regard the record as presenting a single case for our consideration.

Our statute provides that the transcript certified to the circuit court by the city clerk shall constitute the complaint of the contractor. This singular provision makes a pleading for a contractor who expends time, money and labor, in improving streets for the benefit of the municipality and private property-owners, and justice requires that it should not be construed with rigid strictness against him. As the officers of the law, and not the party, make the pleading it ought to stand, unless there is some defect in it which affects the substantial rights of the parties. It is by no means every departure from the statute that will warrant the courts in declaring that the contractor has no complaint. If, therefore, we find no error or defect in the proceedings and transcript before us affecting the substantial rights of the appellants, we must uphold the complaint. It is to be borne in mind that the right to appeal from a precept is a statutory right, for there is no inherent right of appeal. *Ex parte McCardle*, 7 Wall. 506; *State, ex rel.*, v. *Slevin*, 16 Mo. App. 541; *Kundinger* v. *City of Saginaw*, 59 Mich.

355; *City of Minneapolis* v. *Wilkin*, 30 Minn. 140; *La Croix* v. *County Commissioners, etc.*, 50 Conn. 321. As the right to appeal is statutory, it is within the power of the Legislature to declare what questions shall be tried on appeal, and to preclude parties from litigating such as it may deem properly settled by the decision of the municipal officers. See authorities cited in Elliott Roads and Streets, p. 272.

The statute provides that "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council," and it also provides that, "if the court and jury shall find upon trial, that the proceedings of the said officers, subsequent to said order directing the work to be done, are regular; that a contract has been made; that the work has been done, in whole or in part, according to the contract; and that the estimate has been properly made thereon,—then said court shall direct the said property to be sold." Section 3165, R. S. 1881. It is clear that these provisions forbid the property-owners from making any question that reaches back of the contract; and the absence from the transcript of facts or proceedings, affecting matters antecedent to the making of the contract, can not affect the substantial rights of the parties. It is equally clear that irregularities in proceedings prior to the making of the contract can not prejudice such rights. This has often been adjudged. In speaking of an attempt to present questions affecting proceedings anterior to the contract, it was said by BERKSHIRE, J., in *Boyd* v. *Murphy*, 127 Ind. 174, that "The contention of the appellant is in the teeth of the statute." This expresses the result of the decisions upon the subject. *Sims* v. *Hines*, 121 Ind. 534; *Jenkins* v. *Stetler*, 118 Ind. 275; *City of Elkhart* v. *Wickwire*, 121 Ind. 331; *Ross* v. *Stackhouse*, 114 Ind. 200; *Trustees, etc.*, v. *Rausch*, 122 Ind. 167; *Johnson* v. *Allen*, 62 Ind. 57; *McGill* v. *Bruner*, 65 Ind. 421; *City of Fort Wayne* v. *Shoaff*, 106 Ind. 66; *Taber* v. *Grafmiller*, 109 Ind. 206; *City of Greenfield* v. *State, ex rel.*, 113 Ind. 597; *Wiles* v. *Hoss*,

114 Ind. 371; *Clements* v. *Lee*, 114 Ind. 397; *Board, etc.*, v. *Silvers*, 22 Ind. 491; *Palmer* v. *Stumph*, 29 Ind. 329; *Kalbrier* v. *Leonard*, 34 Ind. 497; *Gulick* v. *Connelly*, 42 Ind, 134; *Martindale* v. *Palmer*, 52 Ind. 411. The cases of *Moberry* v. *City of Jeffersonville*, 38 Ind. 198, *McEwen* v. *Gilker*, 38 Ind. 233, and *Kretsch* v. *Helm*, 45 Ind. 438, were in conflict with the much better considered earlier cases, as well as with later ones, and have been overruled. The object of the statute is evident and its effect just. It gives effect to a long existing principle of equity, for it precludes a property-owner, who permits a contractor to improve a street, from defeating a recovery for the work because of errors or irregularities which occurred prior to the time the contract was executed. The statute has much to commend it, nothing to condemn it.

The rule that a property-owner is estopped, by force of the statute, from assailing the proceedings antecedent to the making of the contract disposes of the argument of the appellants' counsel that the transcript is insufficient because of an alleged irregularity in advertising for proposals.

We can not hold that the appellees must lose their cause because the affidavits for the precepts were made by one, only, of the contractors. The affidavit of one person is as effective in such a case as this as that of two persons, and so it has been expressly decided. *Jenkins* v. *Stetler*, *supra*. The decision in *Ray* v. *City of Jeffersonville*, 90 Ind. 567, does not oppose the conclusion here declared, but, on the contrary, impliedly supports it.

The notice to the property-owners of the amount of the assessment and the affidavit for a precept are, as the record shows, combined. They constitute, in contemplation of law, one instrument. In the former the lot assessed is specifically described, so that there can be no mistake as to the lot against which it was asked that a precept should issue. We think it clear, therefore, that the affidavit does contain a description of the lot.

The contention of appellants' counsel that the affidavit is insufficient because it does not properly show an assessment presents a more difficult question than those we have considered and decided. The statute requires that the affidavit shall state that "the whole or some part of said assessment remains unpaid, showing the amount paid and the amount due; that the estimate thereof has been duly made, and that the work estimated has been done according to contract." Section 3165, R. S. 1881. The affidavit before us shows the amount of the estimate, the number of lineal feet of frontage, the cost per lineal foot, and that "no dollars" has been paid, and it shows, also, that a specific sum which is definitely designated, remains unpaid. This, we think, is a sufficient statement of the amount due and unpaid. The affidavit does say in terms that the estimate has been duly made, and that the work has been done according to the contract, and this is a sufficient statement as to the estimate. The decision in *Balfe* v. *Johnson*, 40 Ind. 235, is not of controlling influence, because the lot against which the precept is issued in this case is specifically described. There is not here, as in that case, the inclusion of several separate lots in one affidavit, and a gross assessment against all. Here the affidavit states the specific assessment against each particular lot, and each affidavit designates the cost per lineal foot, so that there is no similarity between the two cases. The affidavits do refer to a contract, do designate South Fifteenth street as the street improved, and aver "that more than twenty days have elapsed since the date of the estimate; that the same was duly made and that the work estimated has been done according to contract between said Grottendick and Cronin and the city." There is, therefore, no such defect as that which existed in the affidavit in *Clements* v. *Lee*, 114 Ind. 397, where the court said: "There is no intelligent reference to any contract which the affiant had theretofore entered into with the common council of the city of Crawfordsville for the improvement of the street de-

scribed in the ordinance directing the work, nor does the affidavit state the amount which had been paid, or that the work was done under a contract entered into with the city council, and that the work so done has been duly estimated." We have examined the record on file in *Clements* v. *Lee, supra,* and find the affidavits radically different from the affidavit contained in the record before us, so that the decision in that case is not influential here. We can not assent to the doctrine that an affidavit must recapitulate all the steps that have been taken, for the statute, as we have seen, declares what it shall contain, and it is sufficient if it substantially conforms to the statutory requirements. There would be little use in requiring a contractor to rehearse to the common council its own acts. It would serve no useful purpose to compel him to convey information already imparted to it by its own records, nor would the property-owner receive the slightest benefit from such a requirement. It would be ineffective and fruitless, and it is evident that the statute exacts no such strictness. We adjudge all the affidavits, save three or four, to be sufficient.

It is probably true that some of the affidavits are defective, but whether they are or not is immaterial, for if there is one good affidavit the transcript can not be condemned. It is an elementary rule that if part of a pleading is good, a demurrer to the entire pleading is unavailing, and that rule applies here, for the appellants have treated the transcript as a single complaint, and as such have assailed it by demurrer. They have also assigned as error the overruling of the demurrer to the complaint, thus treating it as an entirety. Having voluntarily elected to so treat the transcript, by that election they must abide.

It is insisted that the precepts are fatally defective. One of the grounds of objection is that the engineer is not authorized to certify estimates. We think otherwise. Our judgment is that the engineer is the proper officer to make

the estimate, and that it is his duty, under the law, to make it. *Ray* v. *City of Jeffersonville, supra*; *Taber* v. *Graf-miller*, 109 Ind. 206; *Van Sickle* v. *Belknap*, 129 Ind. 558; *Linville* v. *State, ex rel.*, 130 Ind. 210. See, also, authorities cited in Elliott Roads and Streets, pp. 429, 430.

Another ground of objection to the precepts is, that the names given the contractors do not fully correspond with those appearing in the contract. We can not yield to the contention that the error in giving the names of the contractors defeats the rights of the contractors to compensation for their work. It is very clear that such an error could not have prejudiced the appellants, for there can be no doubt as to the persons intended to be designated, nor can there be any doubt as to the improvement referred to, or as to the contract upon which the assessment is founded. The statute declares what the precept shall contain, and these are the statutory provisions: "Which precept shall be signed by the mayor and attested by the clerk, and sealed with the seal of said city, and shall set forth the name of the person against whom the assessment is made; the description of the lot or land on which it is made; the amount of such assessment; and the date of the estimate." Section 3165, R. S. 1881. There is no express requirement that the names of the contractors shall be given, and we do not think that an error in naming them can be regarded as fatal, whether a failure to name them at all would or would not be fatal we do not decide, for there is no such question here, as names are given which are in part correct.

The question in this case is not whether the appellants shall lose title to their property, but the question is, can the contractors enforce the assessment? There is an essential difference between a case where the question of title is in issue and a case where the question is as to the right to enforce a lien. Many irregularities available in the one case are of no effect in the other. Where there is a legal or equitable lien a party may prevent it from ripening into a

title, but to do so he must tender the amount of the lien. *City of Indianapolis* v. *Gilmore*, 30 Ind. 414; *Jackson* v. *Smith*, 120 Ind. 520; *City of Elkhart* v. *Wickwire*, *supra*. See, also, authorities cited in Elliott Roads and Streets, pp. 386, 388.

The special verdict returned by the jury is needlessly prolix and contains some matters of evidence, and, probably, some conclusions of law, but these matters do not necessarily vitiate it. The rule is that a verdict will be sustained if, after eliminating improper matters, it contains facts sufficient to sustain a judgment. *Terre Haute, etc., R. R. Co.* v. *Brunker*, 128 Ind. 542; *Horton* v. *Hastings*, 128 Ind. 103; *Hamilton* v. *Byram*, 122 Ind. 283. A motion for a *venire de novo* reaches matters of form, and is effective only when the verdict is materially defective. *Bowen* v. *Swander*, 121 Ind. 164; *Louisville, etc., R. W. Co.* v. *Green*, 120 Ind. 367; *Peters* v. *Banta*, 120 Ind. 416. The rules declared by the authorities to which we have referred require the conclusion that there was no error in overruling the appellants' motion for a *venire de novo*.

The transcript shows that the estimate of the engineer was adopted and approved by the common council, and this constituted a sufficient assessment. The fact that the resolution adopting the estimate provides that property-owners who have paid part of former assessments which were vacated does not invalidate it nor impair the effectiveness of the assessment. The provision that payments made shall be duly credited is nothing more than a declaration of what the law implies, for, in reason and in justice, the property-owners were entitled to an allowance for what they had paid. It is, at all events, clear that no harm could possibly result to the appellants, or to any other property-owner, from the provision in the resolution to which we have referred. If the appellants had paid nothing on the assessment (and the record shows they had not), they can not successfully complain even if others could, for the question is, what is the

effect of the proceeding upon them, not what it is upon others?

It is contended that the special verdict does not authorize a judgment, because the assessment is levied upon the whole of each lot and not upon fifty feet in depth as provided by the amendatory act of section 3163, R. S. 1881. This contention can not prevail. The statute which governs this case is not that referred to by counsel, for that statute was repealed by the act of April 13th, 1885. Elliott's Supp., section 753; *Crowell* v. *Jaqua*, 114 Ind. 246; *City of Evansville* v. *Summers*, 108 Ind. 189; *City of Frankfort* v. *State, ex rel.*, 128 Ind. 438. It is the act of 1885, and not the prior act, that governs this case.

The special verdict shows that the first assessment was ineffective because the owner of the lots was given as "Mark Reeves' heirs," and this defect was sufficient to warrant a vacation of the first assessment and the levying of the assessments upon which these proceeding are founded. *Jenkins* v. *Stetler, supra.*

Judgment affirmed.

Filed April 2, 1892.

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No. 15,684.

Smith *v.* The Board of Commissioners of Allen County.

County.—*Liability to Workmen Tearing Down Bridge.—Liable Only to a Traveller.*—A county is not liable for any injury to a servant while engaged in tearing down one of its bridges, although he works under the immediate charge or control of its agent, who is known to the board of commissioners to be incompetent. For an injury occasioned by an insufficient bridge, it is liable only to a traveller.

From the Allen Superior Court.

P. A. Randall, W. J. Vesey, L. M. Ninde and *W. H. Ninde*, for appellant.

R. C. Bell and *S. R. Morris*, for appellee.

MILLER, J.—This action was brought to recover for personal injuries sustained by the appellee, while engaged as a laborer in tearing down a bridge, preparatory to the construction of a new one.

The appellee, at the time he was injured, was in the employ of the county, working under the personal superintendence of one of the members of the board of commissioners who had charge of the work.

The court sustained a demurrer to each paragraph of the complaint, and this ruling is assigned as error.

The cause of action is stated in various forms in the several paragraphs. The first and second aver that the member of the board, who was in charge of the work, was negligent in the discharge of his duties, and that on account of this negligence the plaintiff was injured.

The third paragraph charges that the board of commissioners negligently selected an incompetent and inexperienced superintendent to supervise the tearing away of the bridge, and that by reason of his incompetence and unskilfulness the plaintiff was injured.

In our opinion the court did not err in sustaining the demurrers to either paragraph of the complaint.

A county is a civil or political division of the State, created by general laws to aid in the administration of the government, and in the absence of a statute imposing special duties with corresponding liabilities, is no more liable for the tortious acts or negligence of its officers and agents than the State. *Abbett* v. *Board, etc.*, 114 Ind. 61; *Board, etc.*, v. *Rickel,* 106 Ind. 501; *Sherbourne* v. *Yuba Co.*, 21 Cal. 113; *Symonds* v. *Board, etc.*, 71 Ill. 355; *Hollenbeck* v. *County of Winnebago,* 95 Ill. 148; *Estep* v. *Keokuk Co.*, 18 Iowa, 199.

The only exception to this rule which has been recognized in this State is the liability of counties for the negligent construction or failure to keep in repair county bridges, the keeping of which in repair is specially imposed upon boards

of county commissioners by statute. Section 2892, R. S. 1881.

In the case of *Board, etc.*, v. *Rickel*, *supra*, it was held that this liability exists only in favor of travellers when in the actual use of the bridge.

We are not disposed to extend this liability beyond the point marked out and established by previous decisions of this court.

We find no error in the record.

Judgment affirmed.

Filed April 6, 1892.

No. 15,682.

CHAMNESS v. COX.

BREACH OF PROMISE.—*Evidence.*—*Illicit Intercourse.*—*Violent Conduct of Defendant.*—Evidence showing all the facts in connection with the association of the plaintiff and defendant together and their treatment of each other, including their illicit intercourse with each other, and the defendant's violent conduct to the plaintiff, is proper.

SAME.—*Statute of Limitations.*—A right of action for a breach of promise to marry is not barred where the time between the first refusal to marry the plaintiff and the bringing of the suit is less than six years.

SAME.—*Statute of Limitations.*—*Postponement of Marriage.*—If there is an agreement to marry, and the time for its consummation is postponed from time to time by the defendant up to a date less than six years prior to the commencement of the action when the defendant refused to marry the plaintiff, the action is not barred by the statute of limitations.

PRACTICE.—*Instructions.*—*Written.*—*Commenting on.*—*Waiver.*—The practice of commenting on written instructions condemned.

From the Grant Circuit Court.

C. L. Henry and *E. E. Hendee*, for appellant.

W. H Carroll, *G. D. Dean* and *E. E. Dailey*, for appellee.

OLDS, J.—This is an action by the appellee against the

appellant for breach of marriage contract, and the complaint charges appellant with having sexual intercourse with appellee, resulting in pregnancy.

The parties were of mature age, the appellee a widow and the appellant a widower, and the appellant took the appellee to his house and she kept house for him during the existence of the promise, and two children were born to them as a result of their cohabitation.

The complaint is in two paragraphs. Issues were joined by answer in denial, and by plea of the statute of limitation, and reply in denial thereto. Trial was had, resulting in a verdict and judgment for two thousand dollars.

The only errors discussed arise on the overruling of the appellant's motion for a new trial.

The first error discussed is the overruling of a motion to strike out certain evidence relating to certain quarrels and abusive treatment by the appellant of the appellee, and threats made by him toward her, and that she became afraid of him as testified to by the appellee, a witness in her own behalf.

The evidence tended to show that the appellant commenced paying his attentions to the appellee by visiting her at her home, and soon a proposal of marriage was made and accepted, and the appellant postponed the marriage, on one pretext and another, and induced the appellee to come and make her home at his house and perform household duties for him, and induced her to yield to his illicit embraces, and they so lived for several years having two children born to her as the result of their illicit intercourse; that after some lapse of time he commenced a course of cruel and abusive treatment toward her, using violence toward her, threatening her life and ordering her from his house.

The court permitted the introduction of evidence showing all the facts in connection with their association together and their treatment of each other, and it is this evidence the appellant made a motion to strike out, and the court overruled

the motion. In this ruling there was no error. It was entirely proper to admit this evidence.

It was contended on behalf of the appellee that the appellant at first paid his attentions to the appellee and avowed his love and affection for her, and promised to marry her, and took her to his house and gained her confidence and love and induced her to yield to his illicit embraces and then changed his conduct and treatment toward her, and it became such as to clearly indicate that he never intended to fulfill his promise of marriage.

It is next contended on behalf of the appellant that the court erred in commenting upon instructions orally and making certain oral suggestions in connection with the giving of instructions. When instructions are requested to be reduced to writing it is bad practice for a court to make oral comments or suggestions in regard to instructions, even if such comment or suggestions do not amount to an instruction as to the law. In this case the court gave no oral instruction as to the law and the appellant waived any objection to the oral statements made by the court. The court first announced to counsel for appellant that he would like to make the oral statement in regard to the instruction, and counsel replied that it was all right to do so. After this consent on behalf of counsel they can not be heard to object to such oral statement and secure a reversal of the judgment. On account of it counsel object to certain instructions given by the court, viz., instructions 11, 12 and 13, and contend that they are erroneous. We have carefully examined these instructions in connection with the objections suggested in the argument of counsel. We deem it unnecessary to set them out in the opinion. There was certainly no error committed in the giving of either of them.

As to the 11th instruction it is suggested that "it calls the jury's attention to the fact that they may consider various things as tending to prove or disprove the promise of marriage alleged by the appellee. While the evidence be-

fore the jury was simply the promise testified to by the appellee and denied by the appellant." There was a great deal of other evidence introduced which was proper to be considered by the jury in determining whether or not there was a promise of marriage entered into, and this instruction but tells the jury that it is proper for them to consider it.

The 12th instruction relates to the statute of limitations, and we do not think it bears the construction placed upon it by counsel for appellant. It tells the jury that if there was a contract of marriage entered into, and the appellant refused to perform it more than six years before the commencement of this suit, the appellee can not recover. This certainly states the law as favorable to the appellant, as he had the right to ask, and the giving of it constitutes no error for which he is entitled to a reversal of the judgment. Neither was there any error of which the appellant can complain in the giving of the 13th instruction. It tells the jury that if there was an agreement to marry and the time for its consummation postponed from time to time by the appellant up until a period less than six years prior to the commencement of this suit when the appellant refused to marry the appellee and the plaintiff was ready and willing to marry him, then this suit would not be barred by the statute of limitations. There was no error in this instruction prejudicial to the appellant.

It is suggested that the instruction proceeds upon the theory that a refusal on the part of the appellant was necessary to give the appellee a cause of action, whereas an actual refusal was not necessary. Admitting this to be true, we do not think the instruction would be prejudicial to the appellant, though it is not necesary to decide that question, for the instruction, we think, does not proceed upon that theory. It asserts the law to be that if there was an agreement to marry, and a postponement from time to time up to within a period of less than six years next prior to the bringing of the suit, and then there was a refusal on the part of the ap-

pellant to marry appellee, and she was willing to marry him, she would have a right of action not barred by the statute of limitation. There was no error in the giving of this instruction.

The conclusions we have reached upon the several questions presented lead to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed April 6, 1892.

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No. 15,452.

Stevens *v.* Flannagan et al.

Deed.—*Sufficiency of Description of Land in Deed or in a Contract for a Deed.*—The description of land in a deed is sufficient if it furnishes the means by which the land can be identified; and for that purpose another instrument referred to in the deed may be considered as a part thereof. That which would be a sufficient description of the land in a deed is sufficient in a contract for a deed.

Same.—*Use of Word "Heirs" of Living Person.*—Where the word "heirs" is used in a deed or a contract for the conveyance of land, coupled with other explanatory words showing that it was the intention by the use to designate or describe a class of persons rather than that it should receive its strict, technical interpretation, the courts will give to it a construction conforming to the manifest purpose of the parties.

Same.—*Purchase-Money to be Paid After Vendor's Death to Vendor's Heirs.*—*Right of Administrator to.*—*Interest.*—A contract, followed by proper conveyances, for the sale of land, conditioned that the vendor is to receive back from the vendee a deed conveying to him a life-estate in the land sold, and that the vendee is to pay the purchase-money, in certain instalments, after the death of the vendor, to the vendor's "heirs" (or children), is no part of the assets of the vendor's estate, and his administrators are not entitled to any part of it (unless the estate be insolvent). Such a contract draws interest from the time the payments were to have been made.

Vendor.—*Enforcing Lien of.*—*Insolvency of Vendee.*—A vendor's lien may be enforced without reference to the insolvency of the purchaser.

Contract.—*Contemporaneous Parol Contract Modifying Written Contract.*—If a contract is reduced to writing, it can not be shown that there was a contemporaneous parol contract modifying the written contract.

SAME.—*Beneficiary.—Contract not Delivered to.—Right to Maintain Action on.* —A beneficiary of a contract may demand its performance and enforce it by suit without a delivery of such contract to him.

ACTION.—*Right of Beneficiary to Sue on Contract to which he is not a Party.*— The beneficiary of a contract may maintain an action thereon in his own name, although he is not a party thereto.

PRACTICE.—*Striking Out Interrogatories.*—It is not error to strike out irrelevant interrogatories addressed to the opposite party, nor matters about which there is no dispute.

From the Fayette Circuit Court.

J. W. Conoway and *T. D. Evans*, for appellant.

L. H. Stanford, for appellees.

MCBRIDE, J.—The appellant entered into a written contract with his father, William Stevens, of which the following is a copy:

"This agreement made this 2d day of August, 1877, by and between William Stevens and Sampson Stevens of Union county, in the State of Indiana, witnesseth: The said William Stevens on his part agrees, in consideration of the sum of fourteen thousand dollars, to be paid by the said Sampson R. Stevens, as hereinafter mentioned, to sell and convey unto the said Sampson R. Stevens about two hundred and thirty-four and $\frac{60}{100}$ acres of real estate, situated in Union county, in the State of Indiana. A more particular description thereof will be found at page 213 of deed record five, in the recorder's office of said county, being record of deed executed August 16th, 1835, by John Harlan and wife to William Stevens, and also in deed record O, at page 317, in the records of said county, being the first tract of land described in deed then recorded, executed by William Stevens *et al.* to Rudolph Whitmore. And the said Sampson R. Stevens, on his part, hereby agrees, in consideration of the conveyance to him of said real estate as aforesaid, to pay therefor the sum of fourteen thousand dollars as follows, to wit: Five thousand dollars to the heirs at law of said William Stevens within one year after the decease of

the said William, and the sum of twenty-two hundred and fifty dollars annually thereafter to said heirs, without interest for four years, until the residue of said $14,000 is fully paid, all without relief from valuation or appraisement laws: *Provided,* however, that if Nancy Stevens, the wife of said William Stevens, shall survive him, then said $5,000, first above mentioned, only, shall be paid by the said Sampson R. Stevens within one year after the death of said William Stevens to his heirs as aforesaid (excluding the said Nancy Stevens), and the residue of $9,000 shall not become due and payable until the death of the said Nancy Stevens; upon the happening of which event the said Sampson R. Stevens shall, within one year thereafter, pay $2,250, and the same amount annually thereafter until the whole is paid. The said Nancy Stevens is to take no part of said money, as she is provided for hereinafter. The said Sampson R. Stevens is himself one of the heirs, and shall have the right to retain his portion of the said $14,000, *pro rata,* in the order of the payment as aforesaid, and this right shall enure to his heirs, administrators and assigns, no matter which of the said persons (the said William Stevens or his wife Nancy) shall die first. And the said Sampson R. Stevens further agrees, in consideration of the conveyance to him of said real estate, as aforesaid, by said William Stevens, and his wife Nancy Stevens, to reconvey the same to him for and during the term of his natural life, with remainder over to his wife the said Nancy Stevens for and during the term of her natural life, with reversion over in fee simple to the said Sampson R. Stevens and his heirs forever. And in case the said Nancy Stevens shall die before the said William Stevens, her husband, then at his death said real estate shall revert to said Sampson R. Stevens and his heirs in fee simple forever. In witness whereof," etc.

This suit was brought by certain of the children of said William Stevens, upon the contract, to collect the portion of the purchase-money due, and to have declared and en-

forced a vendor's lien for the same on the land. A copy of the contract was filed with the complaint as an exhibit.

All of the children were made parties, either plaintiff or defendant. The complaint avers full performance of the contract except the payment of the purchase-money. It is averred that both William Stevens and his wife are dead, the wife having died first, and that the $5,000 payment provided for is due and the said purchase-money is all unpaid. The complaint also contained a full description of the land. The court overruled a demurrer to the complaint, and the appellant excepted. The appellant filed an answer in abatement, showing that an administrator had been duly appointed for the settlement of the estate of said William Stevens, and was then actively discharging that duty; that he had, as such administrator, inventoried said contract as a portion of the assets of the estate, and that the appellants have paid a portion of the sum due on the contract to the administrator, who was not joined as a party to the litigation. The court sustained a demurrer to this answer and the appellant excepted. An answer in bar was filed in seven paragraphs. No question is made except on the third, fifth, sixth and seventh paragraphs. The third paragraph of answer pleads payment to the administrator. The fifth paragraph alleged the death of William Stevens, testate, contest of his will, which contest was still pending, and the appointment of an administrator, who was engaged in the settlement of the estate; that the estate was indebted in a large amount; that the administrator had taken possession of and inventoried as a part of the assets of the estate the contract sued on, and had collected from appellant the $5,000, constituting the first payment, and all that was then due, and that further administration in the estate was necessary.

The sixth paragraph alleges that the contract was never delivered, or its delivery ever authorized, by said William

Stevens to any of his heirs, nor to defendant, and that when it was executed said William Stevens had no heirs.

The seventh paragraph rests upon an alleged contemporaneous parol agreement, or understanding, between the parties to the contract, the effect of which would be to require an accounting among the beneficiaries, and an allowance for alleged advancements to several of them.

Demurrers were sustained to all of these answers, and these rulings, as well as the rulings on the demurrer to the complaint, and the plea in abatement, are assigned as error.

The appellant insists that the complaint is bad because the contract contains no description of the land, and is, for that reason, void. So far as this objection is concerned, the ruling of the trial court may be sustained upon several grounds. It is, however, only necessary to refer to two or three familiar and elementary propositions which amply vindicate its correctness. That is certain which may be made certain.

The description of land in a deed is sufficient if it furnishes the means by which the land can be identified. *Rucker* v. *Steelman*, 73 Ind. 396; *Scheible* v. *Slagle*, 89 Ind. 323; *Thain* v. *Rudisill*, 126 Ind. 272.

If the deed refers to another instrument for the purpose of identifying the land, the contents of such instrument are to be considered as part of the deed. *German, etc., Ins. Co.* v. *Grim*, 32 Ind. 249; *Wallace* v. *Furber*, 62 Ind. 103.

That which would be a sufficient description of the land in a deed is sufficient in a contract for a deed. The references in the contract to the recorded deeds are sufficient to require that they be read in conjunction with the contract.

It is not claimed that the descriptions in the recorded deeds were not full and complete.

The appellant also insists that the complaint is bad because it does not aver the insolvency of the appellant. Such averments were not necessary. A vendor's lien may be declared or foreclosed without reference to the insolvency of the debtor. The authorities cited lend no support to the con-

tention of the appellant. They only hold that the vendor's lien is not an original and absolute charge on the land, but only an equitable right to resort to it in case there be not sufficient personal estate. *Martin* v. *Cauble*, 72 Ind. 67 (75), and cases cited.

The demurrers to the plea in abatement, and to the third and fifth paragraphs of answer, present the same question.

The appellant contends that the claim for purchase-money belonged to the estate, and was properly inventoried by the administrator, and might properly and legitimately be paid to him. As we understand his argument, it is, in effect, that while the contract, in terms, provides for payment to the heirs of William Stevens, he could, while living, have no heirs; that no one could acquire any vested interest in it until after his death, for the reason that his heirs could not be known until that time; and that of necessity, therefore, it belonged to him until his death, his possible heirs having a mere contingent interest therein until that time.

While it is true that the word "heirs" has, in law, a fixed and technical significance, and a man can not, in that sense, while living, have heirs, it is clear to our minds that as used in this contract the word was not used in that sense. The aim of courts, in the construction of contracts, should be to ascertain and enforce the intention of the parties. The word "heirs" may be, and frequently is, construed to mean children, when it is plain that it was used in that sense. This frequently occurs in the construction of wills. *Shimer* v. *Mann*, 99 Ind. 190, and authorities cited; *Jones* v. *Miller*, 13 Ind. 337; *Rapp* v. *Matthias*, 35 Ind. 332.

The rule, however, is not limited to the construction of wills.

Where in a deed or contract for the conveyance of land the word "heirs" is used, coupled with other explanatory words showing that it was the intention by its use to designate or describe a class of persons rather than that it should receive its strict, technical interpretation, the courts will

give to it a construction conforming to the manifest purpose of the parties. This question is fully considered in the case of *Fountain, etc., Co.* v. *Beckleheimer*, 102 Ind. 76.

The contract recites that "The said Sampson R. Stevens *is himself one of the heirs.*" This is entirely consistent with the construction which treats the word "heirs" as descriptive of a class of persons then in being, and then capable of being ascertained and designated with certainty. It is, however, inconsistent with the idea that the parties were referring to the heirs proper, who could have no existence as such until after the death of William Stevens. The contract also secures to him, and to his heirs, administrators, etc., the right to deduct and retain from each separate payment of the purchase-money his *pro rata* share of the purchase-money, whether he survive the father and mother or not. This he or they could do if the construction to which we incline is adopted. It could not be done if the other contention prevails, as in that case his share could not be known until the estate was finally settled and distribution made. In our opinion the estate has no interest in or claim upon the contract, or the purchase-money. The administrator had no right to inventory or take possession of it as an asset. Payment to him was unauthorized, and is not a defence.

It is not claimed that the estate is insolvent, or that the disposition of the property in any manner operated to the prejudice of creditors. If such facts were shown a very different question would be presented. What we have said is decisive of the questions arising on the sixth paragraph of answer.

The seventh paragraph, resting as it necessarily does on an alleged cotemporaneous parol modification of the contract, materially modifying its terms, is so clearly bad that no elaboration is necessary.

It is also contended that the appellees can not maintain the action against the appellant because there is no privity

of contract between them. Before the adoption of the code, when law and equity were administered by separate tribunals, privity of contract was essential to the maintenance of an action at law, but in equity a promise of one person to another for the benefit of a third could be enforced by the latter in his own name. Under our present practice the right of the third person to maintain his action in his own name has been uniformly recognized. *Carnahan* v. *Tousey*, 93 Ind. 561, with authorities there cited; *Leake* v. *Ball*, 116 Ind. 214, and many other cases.

The conditions of the contract, so far as William Stevens was concerned, were fully performed by the conveyance of the land. The appellant thereby obtained the full consideration for his promise to pay the purchase-money. It was competent for them to agree upon any person to whom the purchase-money should be paid. So far as the rights of the appellees are concerned, there can be no material difference between their rights under this contract and their rights as they would have been if, instead of evidencing the agreement to pay by the written contract, Sampson R. Stevens had executed his notes for the several sums due the several parties direct to them.

The only thing remaining to make performance of the contract complete was the rendition of the agreed consideration. The law recognizes the right of the beneficiaries to demand performance without the formality of any delivery of the contract to them. In equity they are its holders without that formality, and, as such, they are also possessed of the equitable right to have the vendor's lien declared and enforced. *Shanefelter* v. *Kenworthy*, 42 Ind. 501.

The appellant filed interrogatories with his answers, and asked that the other parties to the litigation, both plaintiff and defendant, be required to answer them under oath. On motion the court struck them out. The appellant complains of this ruling.

The statute, section 359, R. S. 1881, authorizes the filing of interrogatories, relevant to the matter in controversy, and the party filing them may require "the opposite party to answer them under oath." Whether the fact that the interrogatories in this case, instead of being addressed to the opposite party, are addressed to all the other parties, both plaintiff and defendant, would afford ground for striking them out, need not be decided. It is enough to say that with the possible exception of three they were not relevant to any matter in controversy, as they relate to advancements assumed to have been made to certain of the heirs. The three, which possibly relate to matters involved, relate to matters about which there is no dispute. There was no error in striking them out sufficient to justify a reversal. The error, if any, was harmless.

The appellant also contends that his motion for a *venire de novo* should have been sustained, because the court made no finding as to advancements, and as to amounts paid to the administrator by the appellant. As neither of these matters was legitimately within the issues, it is not necessary to consider whether, if they were, the alleged errors could be reached by this motion.

Several other questions are discussed, but they are all covered by what we have heretofore said, except the complaint that the court erred in allowing interest. This was not error.

Judgment affirmed, with costs.

Filed April 6, 1892.

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141	549
142	638
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144	606
181	131
155	676
156	635
131	131
168	30
131	131
171	36

No. 15,108.

SMITH ET AL. *v.* JAMES ET AL.

DEED.—*Use of Word "Executed."—Delivery.*—The word "executed," in reference to the execution of a deed, implies a delivery.

SPECIAL FINDINGS.—*Evidentiary Facts.—Use of Word "Executed" in.*—Statements of evidentiary facts should not be inserted in a special finding, and will not be considered on appeal. For use of the word "executed," in a special finding, as applied to a deed, see opinion.

SAME.—*New Trial.—Assailing Conclusions of Law by.*—A motion for a new trial is proper where there is a special finding; but it is not a proper mode of assailing the correctness of the conclusions of law.

NEW TRIAL.—*Bill of Exceptions For Not Necessary.*—A motion for a new trial does not require a bill of exceptions to make it a part of the record.

PRACTICE.—*Competency of Witness.—Question under Section 630, How Reserved.*—A question upon the competency of a witness may be reserved under the provisions of section 630, R. S. 1881; and to present such a question it is unnecessary to bring all the evidence into the record. But to be available so much of the evidence must be stated as will enable the appellate tribunal to clearly understand the nature and effect of the ruling of the trial court and to see its prejudicial character.

SAME.—*Competency of Evidence.—Reserved Question under Section 630.*—An independent and distinct ruling upon the admissibility of evidence may be presented on appeal as a reserved question of law under section 630; but the questions and answers connected with other evidence can not be so reserved without bringing in all the evidence upon the subject to which such questions and answers relate.

From the Noble Circuit Court.

R. P. Barr, *H. G. Zimmerman* and *F. M. Prickett*, for appellants.

L. H. Wrigley, for appellees.

ELLIOTT, C. J.—The appellees assert title to real estate, and ask to have their title quieted.

We extract from the special finding these material facts: John James was the owner of the real estate in controversy, on the 16th day of August, 1884, and on that day conveyed it to his son, the appellee Leander James. The finding states

that the grantor had entertained the purpose "to give the land to his son for some years prior to the execution of the deed conveying the real estate. In other parts of the finding the court speaks of the "execution of the deed." The only direct statement upon the subject of the delivery of the deed is this: "The court further finds that said deed to Leander was duly recorded in the proper record of Noble county, in this State, on the 20th day of April, 1885; the court further finds that said Leander did pay some debts of the said John James, contracted prior to the execution of the deed, but the amount so paid did not exceed the sum of forty dollars, and that no other consideration was stipulated between the parties thereto than that which is expressed in said deed, and that prior to the recording thereof there was no actual delivery of said deed personally to the grantee by the makers thereof, or any other than that resulting from such recording."

If we can justly say that the trial court employed the term "executed the deed" in its ordinary legal signification, then we can adjudge that the finding shows a delivery, for the term implies a delivery. *Nicholson* v. *Combs*, 90 Ind. 515 (516).

If we can not do this, we must hold that the special finding of facts is insufficient to support the plaintiffs' claim of title. We say this in full view of many statements of evidentiary matters tending to show a delivery; but statements of evidentiary matters are, as has been again and again decided, out of place in a special finding. We can not give heed to the statements of evidentiary matters in which the finding abounds. Independently of the evidentiary matters, we think it must be adjudged that the trial court used the term "executed the deed" in its usual signification. It is only by so regarding the term "executed the deed" that a reasonable construction can be given the special finding. The finding can be harmonized by so regarding the term. In one place it is said that John James "conveyed the land by

deed" to Leander James, and in another it is said that a purpose was entertained "for some years prior to the execution of the deed conveying the real estate." The deed recites that the grantee covenants to maintain the grantor and his wife, and the finding states that he did maintain them. We conclude that the statement of the finding which reads thus: "The court further finds that John James voluntarily and freely executed the deed of August 16th, 1884, and was always thereafter satisfied with said conveyance," considered in connection with other statements, must be regarded as the finding of the ultimate, or inferential, fact that there was an effective execution of the deed, including delivery as well as the signing and sealing.

The presumption is in favor of good faith, and against fraud, and as the special finding is silent upon the subject of fraud, it is to be construed as against the parties alleging fraud, and these parties are the appellants.

The ultimate fact of the mental soundness of the appellees' grantor is expressly stated, and that of course controls. The statement of evidentiary matters upon that subject are without force.

A motion for a new trial is a direct motion, and does not require a bill of exceptions to bring it into the record. This has long been the rule. A motion for a new trial is proper where there is a special finding, but it is not a proper mode of assailing the correctness of the conclusions of law.

A question upon the competency of a witness may be reserved under the provisions of section 630, R. S. 1881. It is unnecessary to bring all the evidence into the record in order to present a question of the competency of a witness as a reserved question of law. If so much of the evidence is stated as enables the appellate tribunal to clearly understand the nature and effect of the ruling of the trial court, and see its prejudicial character, it will be sufficient. *Perkins* v. *Hayward*, 124 Ind. 445; *Shugart* v. *Miles*, 125 Ind. 445. It is probably true that the ruling here assailed is not

shown to be available as error, even if it be conceded to be wrong, inasmuch as it is not shown that there was any conflict of evidence upon the point to which the testimony of the witness was directed, or that the appellants had not themselves opened the door to the admission of the testimony. *Perkins* v. *Hayward*, *supra*. But this question we need not decide, for, assuming that the ruling is well presented, we do not think the testimony of such materiality as to require a reversal of the judgment. We can not, at all events, say upon the isolated part of the testimony admitted that the finding is so clearly wrong as to require us to overthrow it. We must, in the absence of countervailing facts, presume that the finding of the trial court was right upon competent evidence, and as it does not appear from the record that there was a conflict in the evidence that presumption requires us to hold that there was no opposing evidence. *Naugle* v. *State*, 101 Ind. 284. If the bill of exceptions had shown that there was a conflict, we should have a different case. It is proper to say that it is very doubtful whether the appellants are right in their position that Mrs. James was an incompetent witness under the statute. Elliott's Supp., section 19. She was not a party to the suit, and her interest was adverse to her husband's grantee, for, if the deed was invalid, it left an estate in the land in her, whereas if valid, it divested her of all interest. *Rupe* v. *Hadley*, 113 Ind. 416. We may also add that, as there was a question as to the mental capacity of the grantor, it is probably true that as to that question the widow of the appellees' grantor was a competent witness. *Staser* v. *Hogan*, 120 Ind. 207.

A bill of exceptions is in the record which attempts to reserve questions upon isolated and fragmentary matters of evidence, but we think it very clear that the bill does not sufficiently present such questions. We have no doubt that an independent and distinct ruling upon evidence may be presented as a reserved question of law under the statute, but we are equally clear that questions and answers con-

nected with other evidence can not be reserved by a bill which does not bring in all the evidence upon the subject to which the questions and answers relate. Evidence can not be understood when wrenched from that with which it is connected, nor can it be known whether error in ruling upon it was not obviated by other rulings or cured by other evidence. A practice that would permit the dissection of evidence and its presentation in fragments would make it impossible for the appellate tribunal to apply the rule of the statute that where a judgment is right upon the merits there shall be no reversal.

Judgment affirmed.

McBride, J., did not take part in the decision of this case.

Filed April 7, 1892.

No. 15,651.

Rush v. The Coal Bluff Mining Company.

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146 153

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148 63
152 597

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170 15

Negligence.—*Directing Verdict for Defendant.—When Should not be Done.*—The court should not direct a verdict for the defendant, in an action to recover damages on account of the negligence of the plaintiff, if the evidence is such that a fair inference may be drawn from it that the defendant was guilty of negligence producing the injury, and that the plaintiff was not guilty of negligence which contributed to such injury.

Same.—*When Court may Direct Verdict for Defendant.*—If from the evidence no reasonable inference of negligence on the part of the defendant causing the injury can be drawn, or there is but one reasonable inference to the effect that the plaintiff's negligence contributed to the injury, then it is the duty of the court, on request, to direct the jury to return a verdict in favor of the defendant.

Same.—*Inference to be Drawn from Evidence.—Directing Verdict.*—If the evidence is such that impartial men may differ as to the conclusion to be drawn from it, the court must submit the question of negligence to the jury; but if there is no evidence supporting any particular fact or theory of the case and authorizing a reasonable inference of such fact

or theory essential to a recovery or sufficient to create a reasonable difference of opinion in the minds of impartial men sitting in judgment on the case, then it is the duty of the court to direct the jury to return a verdict against the party having the burden of establishing the material facts essential to a recovery.

SAME.—*Mine.—Injury in Shaft of.*—For a case where the defendant is not liable for an injury inflicted by a descending cage, in the shaft of a mine, see opinion.

From the Vigo Circuit Court.

S. R. Hamill, G. W. Faris, I. N. Pierce, P. M. Foley and *J. Foley*, for appellant.

L. D. Thomas, J. G. McNutt and *F. A. McNutt*, for appellee.

OLDS, J.—This was an action brought by the appellant against the appellee for damages resulting from an injury sustained by the appellant while working in the coal mine of the appellee. The injury is alleged to have been caused by the negligence of the appellee, and through no fault or negligence of the appellant. Issues were joined, and, after the appellant had introduced his evidence and rested his case, on motion of the appellee the court instructed the jury to return a verdict for the appellee, and in pursuance of such instruction the jury returned a verdict in favor of the appellee. The appellant filed a motion for a new trial, which was overruled and exceptions reserved, and error assigned on this ruling. The action of the court in instructing the jury to return a verdict in favor of the appellee presents the only question in the case.

The taking of a case from the jury, or instructing them to return a verdict in favor of the plaintiff, is a power vested in a court which should, in a proper case, be exercised, but great caution should be used in exercising this power, and it should not be done where different conclusions might fairly be reached from the evidence. In such a case as the one at bar a jury ought not to be instructed to return a verdict for the defendant if the evidence is such that a fair

inference may be drawn from the evidence adduced that the defendant was guilty of negligence producing the injury, and that the plaintiff was not guilty of any negligence which contributed to the injury. The two elements are necessary to a recovery by the plaintiff, and if the evidence is of such a character as no reasonable inference of negligence on the part of the defendant causing the injury can be drawn from it, or as to warrant but one reasonable inference in regard to the negligence of the plaintiff, and that he was guilty of negligence which contributed to the injury, then it is the duty of the court, on request, to instruct the jury to return a verdict in favor of the defendant. Under such circumstances further continuances of the cause and a prolongation of the controversy, with a possibility of a verdict being returned in favor of the plaintiff which could not be sustained by the evidence, are useless.

It is the province of the jury to weigh evidence where there is evidence from which two conclusions may reasonably be drawn, but it is the province of the court to determine whether or not there is or is not evidence supporting any particular fact or theory of a case, and if there is no evidence authorizing a reasonable inference of such fact or theory essential to a recovery or sufficient to create a reasonable difference of opinion in the minds of impartial men sitting in judgment on the case, then it is the duty of the court to instruct the jury to return a verdict against the party having the burden of establishing such material facts essential to a recovery. If, however, the evidence is such as that impartial men may differ as to the conclusion to be drawn from the evidence, then the court must submit the question to the jury. Such we believe to be the well-established rule of the law.

Jurors can not, without evidence reasonably authorizing an inference of negligence, arbitrarily declare there was negligence. Neither can they, in the face of undisputed facts showing conclusively that a party was guilty of negligence

contributing to an injury, declare that he was free from contributory negligence. *Wabash, etc., R. W. Co.* v. *Locke*, 112 Ind. 404, and authorities there cited; *McClaren* v. *Indianapolis, etc., R. R. Co.*, 83 Ind. 319.

In the Work of the Advocate the rule is stated by Judge Elliott as follows: "The rule generally adopted, although there is some conflict in the authorities, is that, if the evidence given by the plaintiff would not authorize the jury to find a verdict for him, or if the court would set it aside if found, as contrary to the evidence, a nonsuit should be granted on defendant's motion." See pages 690, 691, and authorities cited.

In this case it is not necessary to carry the rule to its verge.

We do not think it can reasonably be inferred from the evidence introduced that the appellee was guilty of any negligence which caused the injury to the appellant. There was a shaft, or passage, leading from the surface, a distance of some one hundred and twelve feet below, and into the mine, constituting the way of ingress and egress to and from it, and through which the men were lowered to the mine in the morning, and lifted from the same in the evening, and through which the coal was elevated to the surface. This was operated by two cages, as they are termed, elevated and lowered by steam power, one being at the top when the other is at the bottom, passing each other midway as the one is lowered and the other is hoisted. They were used to lower the men to the mine, and to raise them from the same, as well as to elevate the coal from the mine to the surface. The coal, at the time of the injury, was being mined some distance from the bottom of the shaft, and there were entries leading in a north and south direction from the bottom of the shaft some distance to the various points where the men were at work in the mining of the coal. There was a passageway in the mine, around the shaft, starting in about thirty feet upon the one side and

coming out about the same distance on the other, where the workmen could pass from one side of the mine to the other around the shaft in safety. At the bottom of the shaft there was a division rail, or post, extending upward on each side, in the center of the shaft, at the sides, separating the two cages as they passed up and down, and the bottom of the shaft on which the cages rested when down was about two feet lower than the bottom of the mine, so that when the cages were being operated, and were on their passage from top to bottom, and *vice versa*, there was the division part and depression to designate the point where the shaft was located.

The appellant was a brick mason by trade, and had never worked in or been in a mine until employed by the appellee. He went into the mine on Saturday, and was shown to his work, and worked during the day, and came out in the evening. The point where he worked was some distance from the shaft. There were no lights in the mine, except those used by the miners on their caps, and such light as shone through the shaft. On light days there was some light cast through the shaft to the bottom, giving some light in the immediate locality of the shaft.

On Saturday appellant was shown his place to work, a boss came to him two or three times during the day, and on one occasion inquired as to his name, and took it down, and directed him to heed no person but him.

On Monday morning the appellant returned to his work. He was lowered to the mine through the shaft, as he had been on Saturday. His boss was not at the surface when he went there, and but two or three others went into the mine at the time he did. When he reached the mine his boss was not there; he made inquiry for him, and not finding him, according to his own testimony, he thought he could find his place to work without a guide, and undertook to do so on his own responsibility. After going some distance, which he estimates as near a fourth of a mile, and meeting

several persons, and inquiring for his boss, he was informed that he was astray, and that his boss worked on the other side of the mine. He then made his way back to the shaft. On his way to the opposite side of the mine, when he reached the shaft, there were several persons standing by it, probably upon the opposite side, with lighted lamps upon their caps; his lamp was also lighted. He testified that he knew the shaft was there, and undertook to walk directly across it, and when under one of the cages, as it was being lowered, it came down upon him, injuring him very seriously. He must have stepped down into the bottom of the shaft, which the evidence shows to be some two feet below the bottom of the passageway, or mine, though he testifies that he had no knowledge of stepping down into it. The appellant had been let down into the mine, through the shaft, on Saturday morning, and lifted from the same in the evening, and again let down on Monday morning but a short time previous to the injury. There were no lights in the mine, except the lighted lamps on the caps of the miners. Instead of waiting and being shown to his work in the mine, he says he thought he could find the place, and undertook, of his own volition, to do so. The miners were only accustomed to return to the shaft in the evening, when they ceased work, to be lifted to the surface. The appellant, failing to find his place to work, returned to the shaft. He knew when he reached it, and carelessly walked in under the cage as it was being lowered. He must have known the use made of the shaft and the cages, the manner in which the cages were hoisted and lowered. Knowing he was at the shaft, as he says, he was required, if he attempted to cross the shaft at all, to observe the cages, and do so when he could avoid danger, to use care proportionate to the known danger; but he gave no heed to the situation, and undertook to cross, and received the injury.

Section 5467, R. S. 1881, provides that the owners of coal mines shall cause to be cut in the side of every hoisting

shaft, at the bottom thereof, a travelling-way sufficiently high and wide to enable persons to pass the shaft in going from one side to the other, without passing over or under the cage, or other hoisting apparatus. There was such a travelling way around this shaft. The law requiring such a way to be made for the benefit of the men who work in the mine, there would be some reason in holding that the appellant knew that such a way was required by law, and that it was his duty, if he desired to cross from one side of the mine to the other, to seek such travelling-way, and pass through it; and that if he attempted to cross over or under the cage he did so at his peril, though it is not necessary to go to the extent of holding this to be the law in this case, for even if the appellant had the right to cross under the cage, he was bound to use due caution and care proportionate to the danger in attempting to do so, which he did not; but on the contrary, knowing he was at the shaft, he carelessly and negligently attempted to cross under the cage without giving any heed whatever to the situation or danger. *City of Richmond* v. *Mulholland*, 116 Ind. 173, and authorities there cited.

There is some evidence to show that the cagers who worked at the bottom of the shaft loading the coal to be lifted could call to persons attempting to cross, and warn them of their danger, and upon some occasions they did so; but if this be true, and the cagers neglected to warn the appellant, it would not create a liability on the part of the appellee. The law does not contemplate that employees working in a mine should cross over or under the cage. It has made provision for a passageway around the shaft, where they may pass in safety. The cagers are not placed there as watchers to warn passers-by of their danger, as watchmen are placed at railroad crossings. They are placed there to perform other labor, the loading and unloading the cages, as they are lifted up and down. There is no evidence that they even saw the appellant approaching; and even if they neglected a duty, it

was but the negligence of a fellow servant, for which the appellee would not be liable. *Brazil, etc., Co.* v. *Cain,* 98 Ind. 282.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 7, 1892.

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131 142
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No. 15,406.

Patoka Township et al. v. Hopkins.

Surface Water.—*Township Authorities Casting on Adjoining Land.—Injunction.*—A township can not collect water along a public highway therein, in an artificial channel, and then cause it to flow upon the adjoining lands of a private individual in a greatly increased quantity; and its officers may be enjoined, to prevent such flowage. *City of North Vernon* v. *Voegler*, 103 Ind. 314, distinguished.

Same.—*Court Directing Place and Method of Constructing Township Drains.*—A court can not direct how or when drains shall be constructed by highway officers, for the control of that matter is committed to those officers, and not to the courts.

Practice.—*Cross-Errors.*—For the practice relative to cross-errors, and the right to costs on reversal, see opinion.

From the Gibson Circuit Court.

M. W. Fields and *J. W. Ewing,* for appellants.

L. C. Embree and *W. P. Howe,* for appellee.

Elliott, C. J.—The complaint of the appellee is for an injunction, and the abatement of a nuisance. The complaint alleges that the appellee owns eighty acres of land, lying along a public road, under the control of Patoka township; that the natural surface of the land is such that the surface-water which collects south of the road flows south over the appellee's land, and the water which collects on the north side of the road flows north and away from his land; that prior to the first day of May, 1889, the township had cut two artificial ditches, one on each side of the road; that on the

day named the township constructed a culvert across the road, so that the water in the north ditch poured into the south ditch; that neither of the ditches constructed by the township is a natural watercourse; that along the north line of the road the property owners had constructed high embankments, and thus prevented the water from flowing upon their land, and caused it to be confined in the north ditch; and that a great quantity of water collects in the ditch north of the road; that by uniting the two ditches the water was thrown upon the appellee's land, rendering it wet and untillable.

The case has been ably argued, and the questions well presented. The questions are important, and not free from difficulty.

Surface water, it has been said, is a common enemy, which the land-owner may fight off his land, as best he may. But while there is something of truth in the statement, there is, nevertheless, much of error. It is not true, in law, that a land-owner, or a municipal corporation, may collect surface water in an artificial channel, and pour it upon another's land. Whatever doubt may have once existed upon this subject, none longer exists. It is now well settled that the right to fight off surface water does not authorize it to be collected in a volume and cast upon the land of another. *Davis* v. *City of Crawfordsville*, 119 Ind. 1, and cases cited; Gould on Waters (2d ed), section 271. A public corporation has no more right to collect water in an artificial channel, and cause it to flow upon the land of another, in a greatly increased quantity, than has a private land-owner This is established law. It is clear, therefore, that if the township authorities did collect the surface water in an artificial channel, and thus cause it to flow upon the appellee's land, his rights of property have been invaded, and an action will lie. Another settled principle of law is here influential. That principle is this: If a public corporation, by its acts, makes necessary an outlet for the escape of water collected by it in artificial water-

ways, that outlet it must provide. If it fails to provide the outlet made necessary by its own act, it is guilty of an actionable wrong. *City of Evansville* v. *Decker*, 84 Ind. 325, and cases cited; Gould on Waters (2d ed.) 517, section 261. See, also, authorities cited in Elliott Roads and Streets, 363, and authorities cited. In this instance the public corporation united two ditches, and thus conveyed upon the appellee's land, by artificial waterways, a great volume of water, that naturally flowed in a different direction, and this they did without providing an outlet. They were, therefore, the authors of a positive wrong.

The case before us does not fall within the rule that a public corporation is not liable for consequential injuries resulting from the improvement of a highway in a careful and skilful mode. Here the corporation constructed artificial ditches, and gathered the water in one volume; here, it united two artificial waterways, and here it changed the natural flow of the water. This was done in view of the fact that the consequences of the union of the two ditches would necessarily cast an increased volume of water upon the appellee's land, for the surroundings were such, as the complaint shows, as rendered this result inevitable.

The rule declared in the case of *City of North Vernon* v. *Voegler*, 103 Ind. 314, does not govern this case. The reason for this conclusion is evident. In the case referred to there was simply negligence in constructing a culvert at a place where there was authority to construct it; while here there was no right to so construct a culvert as to unite two artificial channels, change the natural flow of water, and cast it upon the appellee's land in an increased volume. There is here more than the negligent construction of a culvert; more than negligence in devising a plan, for there is a positive wrong, inasmuch as the natural flow of water is changed, and thrown upon the appellee's land, in a greatly increased volume.

It is assumed that the township officers had authority

to construct the culvert, and it is asserted as a conclusion from the premise assumed, that they can not be enjoined from doing what they have lawful authority to do. In support of this position we are referred to the cases of *City of Kokomo* v. *Mahan*, 100 Ind. 242; *Mayor, etc.*, v. *Roberts*, 34 Ind. 471; *Wilson* v. *Mayor, etc.*, 1 Denio, 595; and *McOsker* v. *Burrell*, 55 Ind. 425.

The assumption is not valid, and with it falls the conclusion founded upon it. The assumption is not sustained by the authorities cited, nor has it any foundation in principle. This is obvious from what we have said, for the assumption can not stand against the settled principle that water can not be collected in artificial channels, the natural flow changed, the volume increased, and no outlet provided. It is one thing to grade a highway, and cast off surface water, as a consequence of the grading, and quite another thing to change the natural flow, unite artificial channels, increase the volume of water, and cause it to flow upon private property in an increased volume. It is not the mere fact of constructing the culvert across the highway that constitutes the actionable invasion of the plaintiff's right of property, for the acts of the public corporation extend far beyond the mere construction of the culvert. The corporation may construct culverts but it can not destroy private property by uniting in one artificial channel a great body of water, changing the natural flow, and throwing the collected water upon the citizen's land.

We fully agree with appellants' counsel that a complaint must proceed upon a definite theory, and be sufficient upon the theory adopted, but we can not agree that the rule stated condemns the appellee's complaint. The theory of the complaint is that the appellee is entitled to an injunction, and to that theory the facts stated are fitted. It is true that the complaint characterizes the culvert as a nuisance, and it may possibly be true that it is not a nuisance (a question it is not

necessary to decide); but, granting that it is not, still, the facts stated show a right to the relief prayed, and sustain the general theory of the pleading. Against facts epithets are of little force, and here there are substantive facts showing a clear right and its wrongful invasion. It may be true that the appellee is not entitled to all the relief prayed, but if it were conceded that he is not, it would not warrant the conclusion that the complaint is bad, for the law is that if the complaint shows the plaintiff entitled to a part of the relief demanded it will repel a demurrer. *Bayless* v. *Glenn*, 72 Ind. 5.

We can not disturb the finding upon the evidence.

The appellee has assigned as cross-error the refusal of the court to embody in the decree an order abating the culvert as a nuisance. As the court awarded an injunction against the maintenance of the culvert, we can not perceive that the appellee was harmed by the refusal of the court to modify the decree in the particular indicated.

The appellee also asked the court to modify the decree by striking out one of its provisions. The motion and the part of the decree objected to are properly brought into the record by a bill of exceptions, so that it is our duty to decide the question presented. It is a mistake to suppose that an appellee who properly saves a question and duly presents it by the assignment of cross-errors is not entitled to affirmative relief. An appellee may do more than save costs or prevent a reversal by appropriately assigning cross-errors. He may in many instances accomplish as much by the assignment of cross-errors in a case appealed by his adversary as by himself prosecuting an appeal. *Johnson* v. *Culver*, 116 Ind. 278; *Feder* v. *Field*, 117 Ind. 386; *Shinkle* v. *First Nat'l Bank*, 22 Ohio St. 516; *Collins* v. *Davis*, 32 Ohio St. 76.

The part of the decree which we deem subject to the objections urged by the appellee is that indicated in the first specification of the appellee's motion to modify. That part should be eliminated. The part of the decree indicated as-

sumes to declare what the township officers shall do in the way of constructing drains for the highway. We regard it as quite clear that the court can not direct how or when drains shall be constructed by highway officers, inasmuch as the control of that matter is committed to those officers, and not to the courts. *Weaver* v. *Templin*, 113 Ind. 298, and cases cited; *City of Fort Wayne* v. *Cody*, 43 Ind. 197, and cases cited. We should hold that the error in directing the highway officers where and how to construct the drains was one of which the appellee could not successfully complain if it were not for the fact that the order provides that they shall be constructed, in part, at least, on his land. As all the parts of the decree affecting this particular matter are inseparably blended, the whole clause must be struck out, and the decree be so remodelled as to award an unconditional injunction.

The judgment is reversed upon the appellee's assignment of cross-errors, and affirmed upon the appellants' assignment of errors. The trial court is instructed to modify the decree as herein indicated, and to proceed in accordance with this opinion.

Filed April 6, 1892.

No. 15,769.

LINDER v. SMITH.

PLEADING.—*Complaint.*—If the plaintiff is entitled to any substantial relief, on the facts stated in his complaint, a demurrer thereto should be overruled.

From the Madison Circuit Court.

W. A. Kittinger and *L. M. Schwinn*, for appellant.

J. W. Lovett and *S. M. Keltner*, for appellee.

COFFEY, J.—This was an action in the Madison Circuit Court to recover a personal judgment for material furnished

and work and labor done and performed in the construction of a cistern.

Coupled with the allegations necessary to the recovery of a personal judgment were allegations seeking to foreclose a mechanic's lien.

The court overruled a demurrer to the complaint, and this ruling is the only one discussed by counsel in their briefs.

The court did not err in this ruling.

Independent of the right to a mechanic's lien the complaint was good as an action for a personal judgment. If a plaintiff is entitled to any substantial relief on the facts stated in his complaint, a demurrer thereto should be overruled. *Howe* v. *Dibble*, 45 Ind. 120.

Judgment affirmed.

Filed April 8, 1892.

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171 577

No. 15,482.

Russell v. Merrifield.

Contract—*Interpretation of.*—When the contract and the terms of the entire instrument taken together show conclusively that the wrong word has been used through inadvertence, it is the duty of the court to interpret the contract according to the manifest intention of the parties, and to instruct the jury accordingly.

From the Marion Superior Court.

G. W. Spahr, for appellant.

E. F. Ritter and *L. Ritter*, for appellee.

McBride, J.—The appellant and the appellee Charles E. Merrifield were engaged in business as partners. The partnership was dissolved by mutual consent, and the terms of the dissolution were evidenced by a written contract, which was executed in duplicate.

This suit was brought by the appellant, on the contract, alleging failure on the part of the appellee to perform certain of its conditions. A copy of the contract was filed with the complaint as an exhibit. The copy thus filed contained the following:

"It is further understood and agreed that the party of the first part shall have all the assets of the firms of Russell & Merrifield and C. E. Merrifield & Co. (for and in consideration of the covenants hereinbefore set forth by him faithfully to be performed), excepting as hereinbefore mentioned, and that he (the party of the second part) shall pay all the indebtedness of the firms of Russell & Merrifield and C. E. Merrifield & Co., except as hereinbefore set forth."

The appellee, with other pleadings, filed a plea of *non est factum*, denying the execution of the contract thus set forth. He also filed a cross-complaint, based upon the same contract, and filed with it, as an exhibit, a copy of the contract. The copy thus filed was precisely like that filed by the appellant, except that in the portion above quoted the word "second" is used instead of "first," making it read: "It is further understood and agreed that the party of the *second* part shall have all the assets," etc., a difference of but one word, but a very material difference.

The court instructed the jury that the two contracts were in "legal effect one and the same contract," saying to them, in substance, that the law interpreted them alike.

The appellant's counsel contends that this action of the court was erroneous. This is the only error discussed. We do not deem it necessary to state the grounds upon which he bases his contention, nor to follow his argument. His position and his arguments are alike ingenious, but unsound. The object of the litigation was to determine and enforce the rights of the parties under a contract.

The question to be first answered was, what was the contract? Upon this the parties were agreed except as to one word. The reading of the contract made it clearly apparent

that the intention of the parties was that the "party of the second part" should have the assets referred to; indeed, the very sentence in which the disputed word occurs contains self-contradictory provisions if it be read "party of the first part."

In such a case, when the contract and the terms of the entire instrument taken together show conclusively that the wrong word has been used, through inadvertence, it is the duty of the court to interpret the contract according to the manifest intention of the parties, and to instruct the jury accordingly.

The judgment of the superior court is affirmed.

Filed April 8, 1892.

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131	208
133	180
133	540
133	652
131	150
142	93

No. 15,771.

SMITH, TREASURER, v. RUDE BROS. MANUFACTURING COMPANY.

TAXES.—*Injunction.*—A tax-payer who asks that the collection of a tax assessment be enjoined must pay or tender the sum rightfully assessed.

SAME.—*Notice.*—*Pleading.*—In an action by a corporation to enjoin the collection of a tax assessment, if the complaint contains no allegation that notice of the meeting of the board of equalization was not given, it will be presumed that notice was given according to law, and where it appears that the board was in session it will be presumed that it was organized and convened according to law.

SAME.—*Valuation of Corporate Stock.*—*Notice.*—Sections 6357, 6358, R. S. 1881, provide that "the auditor shall annually, on the meeting of the county board of equalization, lay before said board the schedule and statement" required to be made and delivered to the assessor by corporations, and that the "board shall value and assess the capital stock."

Held, that this is sufficient notice to the corporation that its capital stock will be valued. The act of March 9th, 1889, does not apply to such a case.

From the Union Circuit Court.

T. D. Evans, for appellant.
L. H. Stanford, for appellee.

ELLIOTT, C. J.—The appellee alleges in its complaint that it is a manufacturing company incorporated under the laws of this State; that, on the 1st day of April, 1889, its capital stock was $80,000, divided into sixteen hundred shares of $50 each; that it was located and did business in Union county; that as part of its capital stock it owns a tract of land valued and assessed at $19,000; that, on the 25th day of April, 1889, one of its officers made out and delivered to the assessor of the proper township a true and correct verified statement, as required by law, showing specifically the amount of its capital stock, its name and location, the amount of capital stock authorized, the number of shares into which it was divided, and its actual value on the 1st day of April, 1889; that the statement showed the amount of paid-up capital stock; that the assessor made out a schedule showing therein the capital stock of the corporation; that its actual value was $44,000; that the assessor returned the statement and schedule to the county auditor; that, on the 17th day of August, 1889, the auditor laid the statement and schedule before the county board of equalization, then in session; that the board of equalization entered an order increasing the valuation of the appellee's capital stock from $44,000 to $80,000; that the auditor, pursuant to that order, increased the valuation of the capital stock to $80,000, and so entered it on the tax duplicate; that taxes were assessed thereon at the rate of $1.84 on the $100, making, in the aggregate, an assessment of $662.40; that a copy of the duplicate was delivered to the appellant, the county treasurer, who threatens to collect the assessment; that neither the appellee nor any of its stockholders was given notice of an intention to change the valuation of appellee's capital stock.

The complaint is bad, for the reason that it does not offer to pay the taxes on the amount of capital stock it admits to

be subject to taxation. It has often been decided that a taxpayer who asks that the collection of a tax assessment be enjoined must pay, or tender, the sum rightfully assessed. *Morrison* v. *Jacoby*, 114 Ind. 84, and authorities cited; *City of Logansport* v. *Case*, 124 Ind. 254; *Hewett* v. *Fenstamaker*, 128 Ind. 315; *Board, etc.*, v. *Dailey*, 115 Ind. 360; *City of South Bend* v. *University, etc.*, 69 Ind. 344.

The decision in *Hyland* v. *Brazil, etc., Co.*, 128 Ind. 335, does not oppose the doctrine stated. In that case it was held that no tender was necessary, because, upon the admitted facts, the property against which the assessment was sought to be enforced was not subject to taxation. In the case referred to the earlier cases were fully and strongly approved, and we can not, and shall not, depart from the rule those cases declare. In the case before us the capital stock was returned for taxation, and was subject to assessment, so that even if it be true that there was illegal action in increasing the valuation, an injunction will not lie unless the amount assessed upon property conceded to be subject to taxation is paid or tendered. The rule is a just and salutary one, and is not to be restricted or limited; but, on the contrary, is to be extended so as to coerce the taxpayer who asks equity to do equity, by compelling him to pay or tender all taxes due upon property owned by him that is subject to taxation. *Hyland* v. *Central, etc., Co.*, 129 Ind. 68.

Public officers are presumed to do their duty, and as there is in the complaint before us no allegation that notice of the meeting of the board of equalization was not given, we must assume that it was given according to law. And so, too, we must assume that as the board was in session, it was organized and convened as the law requires. There was, therefore, a legal tribunal in lawful session.

The statute provides that corporations shall make out and deliver to the assessor a sworn statement, and that the assessor shall schedule the property described in the statement. Sections 6357, 6358, R. S. 1881. It also provides that the

statement and schedule shall be delivered to the county auditor, and that "the auditor shall, annually, on the meeting of the county board of equalization, lay before said board the schedule and statement." This provision of a public law conveys notice to the corporation making the statement that its statement will be laid before the board, thus informing it that action will be taken by the board. Nor does the statute stop at this point, for it further provides that "Said board shall value and assess the capital stock of such companies or associations in the manner provided in this act." Section 5358, R. S. 1881. There is, therefore, notice to the corporation that its capital stock is to be valued by the board, and that its valuation—the valuation of the corporate officers—is not final or controlling. The statute fixes the time of the meeting of the board, and hence the corporation has notice when and by whom the valuation upon its capital stock will be made. The doctrine of *Kuntz* v. *Sumption*, 117 Ind. 1, is, we are satisfied, the true one, but it has no application to such a case as this, as was shown in *Hyland* v. *Central, etc., Co., supra.*

The act of March 9th, 1889, does not apply to assessments against corporations as fully, at least, as it does to assessments against natural persons. Elliott's Supp., section 2127. That act requires notice to taxpayers in cases where assessments made by assessors are to be revised, or, possibly, where distinct articles of property are added to a list returned by a corporation. It does not, at all events, fully apply to such a case as the one before us. That statute provides that the board "shall also have power to equalize the valuation made by assessors, either by adding to or deducting from their valuations," and it is but just to require notice where a valuation once effectively made is to be changed. In the case of the valuation of the capital stock of a corporation of the class to which the appellee belongs, the board makes no change or revision. It makes, in fact, the original and effective valuation. Until it acts there is no final original val-

uation of corporate capital stock. The list of the corporation and the schedule of the assessor make no effective valuation; they simply convey information to the board, and that tribunal makes, as the corporation must know, valuation of the corporate property original and effective. It is possibly true that inaction by the board is to be regarded as an approval of the valuation made by the corporation and the assessor, but if the board does take action on the statement and schedule, its action fixes the assessment. The board in such a case does not act as an appellate or revisory body; but, on the contrary, its action is purely original. The corporation must know, as matter of law, that until the board does act there is no effective valuation of its corporate stock, and, consequently, must know that there can be neither change nor revision, for until the board makes a valuation, there is nothing to change or revise. It is far otherwise with a natural person. In the case of a natural person the board makes no original valuation; its duty is to revise and review. A natural person can not be held to take notice without lawful information that the board will change the valuation made by him, whereas a corporation knows that there is, and can be, no final original valuation of its capital stock until the board of equalization makes it as the law directs; it knows, indeed, that its statement must go before the board of equalization, must be acted upon by that body, and that until that body does act, or approves by inaction, there is neither an effective original assessment, nor a complete valuation of its capital stock.

It is quite clear that the complaint does not state a cause of action.

Judgment reversed.

Filed April 8, 1892.

No. 15,667.

THE TRAVELLERS' INSURANCE COMPANY *v.* MARTIN.

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157 583

PRACTICE.—*Sufficiency of Pleading.—Review on Appeal.*—Where a demurrer to a paragraph of a complaint is overruled, but plaintiff amends it before judgment, the defendant can not question the sufficiency of the original paragraph on appeal.

TAXES.—*Quieting Title.—Tax Deed.—Description.*—In an action to quiet title by the holder of a tax deed, the provision of the act of 1881 (Elliott's Supp., section 2143), that if the plaintiff's title is invalid, the amount due shall be ascertained and the lien declared and foreclosed, applies as well to a defect in the description, as to any other defect in the steps necessary to pass a valid title, and proof of the misdescription may be made without special allegation of the misdescription.

SAME.—*Imperfect Description of Land.—Lien for Taxes not Defeated Thereby.*—While an imperfect description of the land in a tax deed will defeat the title, yet it will not defeat the lien, if the purchaser can show what property was intended to be taxed.

SAME.—*Interest.*—Where the State's lien for taxes has been transferred to the purchaser, and a deed has been issued, interest is computed at twenty per cent. per annum. Elliott's Supp., section 2143.

From the Cass Circuit Court.

J. C. Nelson and *Q. A. Myers*, for appellant.

M. Winfield, D. D. Dykeman, W. T. Wilson and *G. C. Tabor*, for appellee.

OLDS, J.—The appellee, in this case, filed her complaint in two paragraphs, against the appellant. The first paragraph was to quiet title, and the second to recover possession of the real estate.

The appellant demurred to the second paragraph of the complaint, which demurrer was overruled, and exceptions were reserved. After the ruling on the demurrer and before judgment, the court permitted the appellee to amend her complaint. Counsel for appellant discuss, with much earnestness, the sufficiency of the second paragraph of the complaint, as it was at the time of the ruling on the demurrer, and before it was amended. There is no question before this

court upon this ruling. The complaint being afterwards amended, the amended paragraph supplanted, and took the place of the original paragraph. The court had the right to allow the amendment. *State, ex rel.*, v. *Hay*, 88 Ind. 274; *Kennedy* v. *Anderson*, 78 Ind. 151; section 396, R. S. 1881; *Burns* v. *Fox*, 113 Ind. 205; *Beaver* v. *North*, 107 Ind. 544; *Town of Martinsville* v. *Shirley*, 84 Ind. 546.

The appellee was a purchaser at tax sale, and had taken out a deed in pursuance of her purchase, and there was a recovery by the appellee for the amount due her, and a lien declared upon the land, and a decree of foreclosure entered.

The land in controversy was owned by one Williamson Dunn, at the time of the assessment for taxation, and was sold as his land.

The complaint describes, by a valid description, the land owned by Dunn at the time of the assessment, and makes no averment as to the description by which it was assessed and entered upon the tax duplicate, or tax certificate, or deed.

It is earnestly contended that under no rule of law without proper averments in the complaint, could it be shown that the lands assessed as the lands of Dunn, and sold by a different and imperfect description, were the same lands described in the complaint. In other words, that the appellee could not recover the taxes paid with penalty, and have a lien declared and foreclosed, unless the description in the tax deed and of record corresponded with the description in the complaint, and the sale declared invalid on account of some other defect; that if the description of record upon which the sale was based, and in the deed, was imperfect and different from that set out in the complaint, there must be allegations to that effect in the complaint to admit the proof. It must be remembered that the statute, section 2143, Elliott's Supplement, providing that in actions to quiet title in such cases, "if, upon the hearing of such cause, it shall appear that the complainant's title was or is invalid for any cause, such suit shall not be dismissed by the court, but the

court, in cases where the tax was due and unpaid, shall ascertain the full amount of taxes and lien which the State had in such land," etc., and order the same sold therefor, is an innovation on the rules of pleading and practice. The proviso that the proceedings in such cases shall be conducted in the same manner, as near as may be practicable, in conformity with the practice in cases of foreclosure of mortgages, does not require any amendment to the complaint, but relates to the conducting of the proceedings, to the evidence and decree. There is no provision of the statute requiring any amendment to be made to the complaint to quiet title in such a case, or that it shall contain other or different averments from those necessary in the ordinary complaint to quiet title, and the statute expressly provides that if the complainant's title was or is invalid for any cause, the amount due shall be ascertained and the lien foreclosed. This applies as well to a defect in the description, as to any other defect in the steps necessary to pass a valid title. It was proper to make the proof under the allegations of the complaint. *Jones* v. *Foley*, 121 Ind. 180.

It is next urged and ably supported by the argument of counsel for the appellant, that the sale is void and ineffectual to transfer the lien of the State to the purchaser, for the reason, that the description is so imperfect as that it does not describe the land with reasonable certainty, and that appellee's money must be refunded out of the county treasury, and this presents the principal and important question in the case.

The policy of the tax law is to secure revenues to carry on the affairs of government, and that all property shall bear its proportion of the burden of taxation; and this policy and object of the law will not be defeated by a failure of the proper officers to enter a perfect description of the property of record, and carry such description through all the proceedings, in case of a sale of the same for taxes. The State has a like lien on all real estate for its proportion of

taxes. A defective description will be ineffective to convey title, but not to transfer the lien of the State to the purchaser.

The question of the sufficiency of a description of land to transfer the lien has repeatedly been before this court, and it may now be said to be the settled law of this State, as stated in *State, ex rel.*, v. *Casteel*, 110 Ind. 174 (186), that "an insufficient description of the land will defeat the title, but will not defeat the lien. The lien will hold if the purchaser can show what property was intended to be taxed, but the title will not pass if the description is defective." See authorities collected and cited in *State, ex rel.*, v. *Casteel*, *supra*. This same rule has been adhered to and stated as the law in subsequent decisions of this court. *Morrison* v. *Jacoby*, 114 Ind. 84; *Millikan* v. *City of Lafayette*, 118 Ind. 323; *Ball* v. *Barnes*, 123 Ind. 394; *City of Logansport* v. *Case*, 124 Ind. 254.

The sections of the statute relating to and governing the question presented in this case are so fully set out, discussed and construed in the decisions which we have cited, that no good purpose can be subserved by again setting them out, and adding additional views in support of the construction placed upon them. We regard the decisions as harmonious and have no disposition to depart from the construction placed upon the statute in such decisions, and we are only called upon in this case to apply the principles laid down in the decisions cited.

It was the intention of the law in relation to the assessment and collection of taxes, that there should be an incentive on the part of property-owners to pay their taxes, and upon a failure so to do, that a penalty should attach which they would be compelled to pay, and there has been a growing tendency to fix with more certainty the lien upon the property, and to remove all technicalities by which the property-owner might defeat a recovery for the taxes and penalties assessable against his property as its proportion of

the revenue necessary to carry on the affairs of the government. With this view the statute was enacted providing, that, if the purchaser failed, for any cause, in his right to recover in an action to quiet his title, he should in the same action, without liability for costs or amendment of pleadings, or an adjustment of the issues, recover a judgment for the amount of the taxes paid by him, together with penalties, and have a lien declared and foreclosed. Every landowner knows that he is liable for taxes upon his land, and that it should be assessed and entered upon the books of the auditor and treasurer of the county It is his duty to look after the assessment of his property and see if the assessment is regular, and his land properly entered upon the books and pay the lawful taxes when due, instead of seeking some method by which he can, by reason of a technically defective description, avoid the payment of his just portion of the expense of a government in which he is equally interested with others. The rule established and fixed by the many decisions of this court that the lien will hold if the purchaser can show what property was intended to be taxed is but a salutary and just one.

In this case there are two tax deeds, in one a tract of land is described as "the south part of the north part of lot five (5), in Burrow's Reserve, in township twenty-seven (27), north of range one (1) east, containing forty (40) acres more or less." In the other the description is: "Part of lot number six (6), Burrow's Reserve, township twenty-seven (27), north of range number one (1) east, containing eighty (80) acres more or less." In the certificates the description is abbreviated, giving the number of acres definitely as 40 and 80, and as sold in the name of Williamson Dunn. The tracts appear upon the duplicate in the name of Williamson Dunn, described in the same manner, giving a definite number of acres, one tract of 40 and the other 80 acres. It then appears of record that Williamson Dunn is charged upon the tax duplicate with and he is assessed for the taxes

on 40 acres, being part of lot 5, and with 80 acres, a part of lot 6. If he, in fact, owned the 40 and 80 acre tracts,a part of these lots 5 and 6, in township 27, range 1, it is just and right that he should pay the taxes upon them, and if he neglected to do so, and they were sold and it can be shown by the purchaser what land was intended to be taxed, and the purchaser furnishes a definite description, there is no just reason why the land should not be liable for the taxes and subject to the lien the same as if it had been properly described in all of the proceedings and upon all the books. Dunn, in fact, owned the land, it was liable for taxes, it was, in fact, assessed. Dunn neglected to pay the tax, the land was sold and purchased by the appellee and was not redeemed; a deed issued but it was entered upon the books by an imperfect description, and this imperfect description was carried through all of the proceedings. There is no reason why the lien should not attach and a definite description be furnished and the lien be foreclosed the same as if it had been definitely described. This is true notwithstanding there may have been a mistake in the number of the lot in which the 40 or 80 acre tract was situated as contended. It is simply an error in the description. Where a man owns 80 acres of land in a township, and it is assessed and his name and the number of acres and the number of the township and range are correctly entered upon the books in the proper office, but otherwise the description is indefinite, there can be no difficulty ordinarily in showing what land was intended to be taxed. If this fact can be shown, it is well-settled by the decisions of this court that the lien attaches and is transferred by the tax sale to the purchaser. Many of the descriptions in the decisions we have cited are as indefinite as those in the case at bar.

A question is made in regard to the amount of recovery. The statute is decisive of this question. Where a lien is transferred to the purchaser and a deed has issued, as in this case, interest is computed at twenty per cent. per annum.

This is the plain wording of the statute. See Elliott's Supp., section 2143; *Culbertson* v. *Munson*, 104 Ind. 451.

Counsel contend that the judgment for appellees was rendered on the second paragraph of the complaint, and that the appellant's motion for judgment in its favor upon the first paragraph ought to have been sustained. We can not assent to this proposition.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 8, 1892.

No. 16,382.

131	161
144	493
145	101
145	658
146	399

Harrison et al. v. Bishop et al.

Will.—*Making of by Person under Guardianship.*—The adjudication of mental unsoundness in proceedings for the appointment of a guardian for a person, while it conclusively establishes the fact of his inability to manage his estate, does not necessarily establish the existence of such unsoundness as would incapacitate him from making a valid will.

Same.—*Appointment of Guardian for Person.—Evidence of Mental Unsoundness.—Burden of Proof.*—It is, however, *prima facie* evidence of such want of mental power, and when the validity of a will is properly in question, if it is shown to have been executed by one under guardianship, the burden is upon those who seek to uphold it to show by clear, explicit and satisfactory evidence that at the time it was executed the maker had the requisite degree of mental capacity.

From the Marion Circuit Court.

R. N. Lamb and *R. Hill*, for appellants.

J. S. Duncan and *C. W. Smith*, for appellees.

McBride, J.—Counsel agree that the only question involved in this case is, "Whether a person who has been adjudged to be a person of unsound mind, at any time, and

for whom a guardian has been appointed, and as to whom such adjudication of mental unsoundness has never been set aside in the manner provided by statute, can, while such adjudication and guardianship exist, make a valid will devising real estate."

In view of this agreement a very brief statement of the facts will suffice.

In the year 1868, Thomas Harrison was, by the common pleas court of Marion county, duly adjudged of unsound mind and incapable of managing his estate. Thereupon the court appointed a guardian of his person and estate who duly qualified and entered upon the discharge of the duties of his trust. Harrison was never thereafter in any proceeding had adjudged to have regained soundness of mind, and continued under guardianship up to the time of his death. March 21st, 1888. While thus under guardianship, he executed a paper purporting to be his last will and testament. He died in Marion county March 17th, 1890, and the will was offered for and admitted to probate in the office of the clerk of the Marion Circuit Court, and an administrator, with will annexed, was appointed, who duly qualified as such and is engaged in discharging the duties of his trust. If the will is valid its effect is to devise certain real estate in Marion county.

The question thus presented was considered and, at least, inferentially decided in the case of *Stevens* v. *Stevens*, 127 Ind. 560. We see no reason to change our opinion as indicated in that case. However, the question as now presented to us requires an express adjudication of the question, and it is, therefore, proper, and perhaps necessary that we briefly review the ground.

Section 2556, R. S. 1881, provides that "All persons, except infants and persons of unsound mind, may devise, by last will and testament, any interest, descendible to their heirs, which they may have in any land," etc.

Section 2544, R. S. 1881, provides that "The words 'per-

sons of unsound mind,' as used in this act, or any other statute of this State, shall be taken to mean any idiot, *non compos*, lunatic, monomaniac, or distracted person."

Section 2545, R. S. 1881, and the several sections immediately following, provide for the appointment of a guardian for a person who is of "unsound mind and incapable of managing his own estate."

The guardian thus appointed has the custody both of the person and of the estate of his ward.

The guardianship terminates with the restoration to reason or the death of the ward. Section 2552, R. S. 1881.

Provision is made for trying the question of restoration to reason of such person. Section 2553, R. S. 1881.

Section 2554, R. S. 1881, provides that "Every contract, sale, or conveyance of any person while of unsound mind shall be void."

The contention of the appellee is substantially as follows: That after one has been adjudged of unsound mind, and incapable of managing his estate and placed under guardianship, there is an absolute incapacity on his part to contract, or in any other manner to transact any business relating to the management of his estate; that the adjudication in such case is conclusive as to his entire want of capacity in that respect; that his status is thereby not only definitely fixed, but that it thereafter continues unchanged during the existence of the guardianship; that although he may, in fact, recover his reason, until that fact has been formally and judicially determined, his entire disability continues; that a person of unsound mind can not make a valid will, and that a will is a form of conveyance, and, therefore, embraced within the terms of section 2554, *supra*, and void also for that reason.

Assuming that the appellee is entirely right, in so far as relates to the disability of one of unsound mind, under guardianship, to transact any business whatever relating to the management of his estate, does it necessarily follow that he may not have both the power and the requisite capacity

to make a valid testamentary disposition of it? Does the adjudication as to his capacity to manage his estate necessarily involve an adjudication that he has not the capacity to dispose of it by will?

The right to make testamentary disposition of property, while, perhaps, uniformly regulated by statute, is by no means created by statute, but is a right common to civilized people in all ages. Our statute, therefore, while regulating the manner of exercising that right can not be said to confer it. No statute in this State, in terms, deprives those of unsound mind of the right to make a will. Nevertheless, a person of unsound mind can not make a valid will. The disability, while not directly declared, is a legitimate and necessary inference from the language of the statute, which declares that all persons, except infants and persons of unsound mind, may make wills. The intention of the Legislature to deny that right to those of unsound mind is plain. The disability thus inferentially declared does not depend upon or arise out of an *adjudication* of mental unsoundness, but rests upon the *fact* of mental unsoundness regardless of any adjudication whatever upon the subject. One, in fact, of unsound mind can not make a valid will whether he has ever been so adjudged or not.

The law, however, recognizes degrees of mental unsoundness. Not every degree of mental unsoundness is sufficient to destroy testamentary capacity. *Lowder* v. *Lowder*, 58 Ind. 538; *Burkhart* v. *Gladish*, 123 Ind. 337.

What degree of mental capacity will suffice to empower one to make a valid will has been frequently considered by the courts. In *Lowder* v. *Lowder*, *supra*, this court approved an instruction to a jury in the following terms: "In legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty,

and who could keep these in his mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind." This is quoted with approval in *Burkhart* v. *Gladish, supra,* and also in *Durham* v. *Smith,* 120 Ind. 463, where the court said: "It is evident that a person might be possessed of the requisite capacity to make a will, as held in *Lowder* v. *Lowder, supra,* and yet have some defect of the mind," etc. Many other authorities might be cited to the same effect. It is too plain for controversy that one might possess mental capacity quite up to or beyond the standard thus established, and yet fall far short of that necessary to enable him to transact business or manage his estate.

In our opinion, therefore, one's mental powers may be so far impaired as to incapacitate him for the active conduct of his estate, justifying the appointment of a guardian for that purpose, and yet he may have such capacity as will enable him to direct a just and fair disposition of his property by will.

The adjudication of mental unsoundness in proceedings for the appointment of a guardian for a person, while it conclusively establishes the fact of his inability to manage his estate, does not necessarily establish the existence of such unsoundness as would incapacitate him from making a valid will.

It is, however, *prima facie* evidence of such want of mental power, and when the validity of a will is properly in question, if it is shown to have been executed by one under guardianship, the burden is upon those who seek to uphold it to show by clear, explicit and satisfactory evidence that at the time it was executed the maker had the requisite degree of mental capacity. *Stevens* v. *Stevens, supra,* and cases there cited. See, also, *Will of Slinger,* 72 Wis. 22; *Wadsworth* v. *Sharpsteene,* 8 N. Y. 388; *Leonard* v. *Leonard,* 14 Pick. 280 (284); *In re Pendleton's Will,* 5 N. Y. Sup. 849.

The circuit court having reached a contrary conclusion erred and its judgment is reversed, at the costs of the appellees.

Filed April 7, 1892.

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131 166
133 592
131 166
135 174
131 166
154 192

No. 14,621.

Ross, Administrator, et al. *v.* Hobson et al.

Venire de Novo.—*When Lies.*—A *venire de novo* will be awarded only when the verdict is defective in form.

Fraud.—*Rescission of Conveyance.*—*Value of Land Exchanged.*—In an action to rescind a conveyance of land procured by the fraudulent representations of the defendant, it is not necessary to state the value of the land conveyed, though such a statement is proper.

Same.—*Allegation of Reliance on Fraudulent Representations.*—An allegation that the plaintiff relied upon the representations of the defendant and was thereby deceived is sufficient to withstand a demurrer, without an allegation that the plaintiff had no information concerning them.

Same.—*Relying on Statements.*—*When Party May.*—A party may rely upon the statements made to him by the defendant when he is ignorant of their untruthfulness and the subject-matter is not in the vicinity of the place of negotiation.

Same.—*Parties.*—*Person Holding Title to Land.*—A person to whom land is conveyed, in an action for a rescission for fraud, is a proper party defendant, though he had no knowledge of the fraud.

Same.—*Death of Defendant.*—*Substituting Administrator.*—If a defendant, who is a party to a fraudulent transaction, die pending suit for a rescission, his administrator may be substituted.

Same.—*Evidence.*—*Admissions.*—The admissions of a defendant, who furnishes the consideration to secure a conveyance of land executed by the plaintiff, and who is the real party in interest, though the conveyance was made to a co-defendant, are admissible, in an action to rescind the conveyance for fraud.

From the Clinton Circuit Court.

N. O. Ross, for appellant.

F. Cooper, *J. O'Brien* and *C. C. Shirley*, for appellees.

Berkshire, J.—This action was brought by the appel-

lees to rescind an executed contract. The complaint is in two paragraphs, which are not materially different.

The first paragraph alleges that the appellees were and are husband and wife; that the appellee, Jesse, was the owner of certain real estate situated in Howard county, Indiana; that on the 5th day of November, 1886, the appellant, George E. Ross, and one Oscar Chandler, who was in life when this action was brought (and a party defendant thereto) but since deceased, conspired and confederated together to cheat and defraud the appellees out of the title to said real estate, and pursuant to such fraudulent purpose and intention, met at the residence of the appellees upon the said real estate and represented to the said Jesse that the appellants, George E. and Martha J., were the owners of the undivided one-third interest in and to certain real estate in Cass county, Indiana, and the appurtenances thereto belonging, consisting of a building and apparatus therein for the propagation of chickens and other domestic fowls, the whole of said property belonging to the Logan Poultry Company, and the said interest of the said George E. and Martha J. being represented by forty shares of the capital stock of said company, of the par value of $50 each; that the business of the above named company was in successful operation, and was prosperous; that the stock of said company was worth in the market its full par value; that its tangible property had cost and was well worth $6,000; that said company was free from debt, and its property unincumbered; that immediately following the said representations, the said Ross and Chandler proposed to exchange the interest of the said George E. and Mary J., in said company as represented by said stock, for the said real estate of the said Jesse; that the appellees believing the said representations to be true, and relying thereon, and being deceived thereby, did on said day, in consideration of the sum of $100 in cash paid by said George E., and the delivery of said forty shares of stock, convey the said real estate so owned by said Jesse by war-

ranty deed to said Chandler, who immediately executed a quit-claim deed therefor to said Martha J., who at the time was the wife of the said George E.; that the last named conveyance was executed without consideration, and without the knowledge of the said Martha J.; that at the time said representations were made, and said conveyance executed by the appellees, the said poultry company was wholly insolvent, and its property encumbered for more than its actual value, all of which was well known to the said George E. and said Chandler; that the business of the said company was not and never had been prosperous, and at the time said representations were made it had abandoned its business as a losing and worthless enterprise, and its stock was not worth the paper on which the certificates thereof were printed; that the residence of the appellees when said representations were made, and said deed executed, was thirty miles from the city of Logansport, the home of said company and its place of business; that the said George E. was a notary public, and although said conveyance was executed for his benefit, by his direction, that he as notary might take the acknowledgment, the conveyance was executed to said Chandler; that as soon as the appellees discovered the fraud they at once demanded a rescission of the contract, and offered to place the appellants *in statu quo*.

It also appears by proper averments that the consideration received by the appellees was tendered in court for the benefit of the appellants.

Demurrers were addressed to both paragraphs of the complaint and overruled by the court and exceptions reserved.

An answer in general denial was filed, and the appellant, Martha J., filed a cross-complaint, alleging a fee simple ownership of the Howard county real estate, and demanding that her title thereto be quieted, and that she recover the possession of said real estate.

The appellees addressed a demurrer to the cross-complaint,

which was overruled, and thereupon they answered with a general denial.

The cause was submitted to a jury for trial, who returned a special verdict; and after unsuccessfully moving for a *venire de novo*, and for judgment on the special verdict, the appellants moved for a new trial, which latter motion was overruled, an exception saved, and judgment and decree rendered for the appellees.

The appellants assign errors jointly and severally.

The questions presented to which we need refer in this opinion arise out of the rulings of the court in overruling the demurrer to the paragraphs of complaint, and in overruling the motion for a new trial; the verdict of the jury was not defective in form, and for no other cause will a writ of *venire de novo* be awarded. *Louisville, etc., R. W. Co.* v. *Hart*, 119 Ind. 273; *Bowen* v. *Swander*, 121 Ind. 164; *Hamilton* v. *Byram*, 122 Ind. 283.

The complaint is not a model pleading, but we think the facts stated in each paragraph disclose a cause of action, and entitle the appellees to a rescission of the contract. One objection to the complaint is that it contains no allegation as to the value of the Howard county land. Such an allegation would have been highly proper, but it is not a necessary allegation. If the appellees had affirmed the contract after discovering the fraud alleged, and had brought an action for damages because of the fraud, then it would have been necessary for them to show the difference between the worth of the property they obtained under the contract when they received it, and what it would have been worth had the representations been true. *Nysewander* v. *Lowman*, 124 Ind. 584.

But as this is a suit in equity to rescind the contract which was executed by the parties, if the appellees are otherwise entitled to have undone all that was done because of the contract, the value of the real estate conveyed by them is a matter of no consequence, as a rescission only restores them to their former position.

That the real estate which the appellees conveyed to the appellant, Martha J., is of some value, clearly appears by the averments of the complaint. It consists of seventeen acres and a fraction of land, and upon it the appellees made their home, and the consideration which the appellants paid therefor was, cash $100, and the said forty-six shares of stock in the poultry company, estimated at $2,000.

But it is further contended that there is no allegation to be found in the complaint that the appellees were uninformed as to the facts to which the alleged representations of the appellant, George E. and Chandler, related.

It is true that there is no such allegation in terms, but it does appear that the appellees relied upon the representations made and were deceived thereby, and these allegations are wholly inconsistent with knowledge on their part. If the allegation as made was not satisfactory to the appellants, they ought to have made a motion that it be made more specific.

But it is further contended that the appellees were not justified in relying upon the representations made, but should have informed themselves before executing the contract, and if they have entered into a contract which is unfortunate for them it is but the result of their own folly.

What would have been expected of the appellees, as persons of ordinary prudence and caution, had they lived in Logansport, or in the vicinity of said city, in ascertaining the value of the poultry company's stock before executing their conveyance to Chandler, we need not inquire.

It appears that the appellees lived thirty miles away, and that the appellant, George E. and Chandler, conspired together to cheat and defraud them of their home, and pursuant to such evil purpose repaired to the home of the appellees and made the representations charged in the complaint and thereby induced them to execute the conveyance; the information was not near at hand which would undeceive

the appellees, and this the appellant George E. and Chandler well knew when they made the representations.

But it further appears that the conveyance, though executed for the benefit of the appellant, George E., was by his direction executed to Chandler; that this suggestion was made that George E. Wright, as notary public, take the acknowledgment of the appellees to the execution of the deed; and it is not unreasonable to presume that the suggestion was prompted on purpose to obtáin the deed while the appellees were under the influence of the deception that had been practiced upon them.

We are inclined to the opinion that the appellees might rely on the representations made, and that the falsity thereof, as alleged, entitled them to a rescission of the contract.

The appellants were all proper parties, and Martha J. was a necessary party. She held the title to the real estate to which the appellees were asking to be restored.

The title having been conveyed to her without her knowledge, and without any consideration, she was the mere receptacle thereof, with all the consequences of the fraud resting upon it, George E. and Chandler being the perpetrators of the fraud, and the conveyance having been made to one of them for the benefit of the other, as alleged, this rendered it entirely proper that they be before the court. And Chandler having died during the pendency of the action before the trial court, it was not improper to make his administrator a party defendant.

The court committed no error in overruling the demurrer to the paragraphs of complaint.

Counsel for the appellants mistake the fact when they assert that the first paragraph of the complaint does not allege that the conveyance to Mrs. Ross was without consideration.

The appellants objected to a jury trial and demanded a trial by the court.

Their objection and request were not confined to the issues

joined in the main action, but were general and applied as well to the issues joined in the cross-action.

As disclosed by the cross-complaint, Mrs. Ross held the legal title to the real estate, and she by her cross-action sought to have her title quieted and to recover possession of the real estate.

The issues in the cross-action were clearly triable by a jury, as a matter of right, upon the request of either party. *Trittipo* v. *Morgan*, 99 Ind. 269; *Martin* v. *Martin*, 118 Ind. 227 (237.)

Had the appellants' request for a trial by the court been confined to the issues joined in the main action, and overruled, we are not prepared to say that there would not have been error; but as a trial by the court was insisted upon in the cross-action, as well as in the main action, the court committed no error in its ruling. And for the reasons stated the request for a special finding was properly overruled.

It is the province of a jury, when a special verdict is desired, to find the facts involved in the issues they are called upon to determine, and not to state evidentiary facts, nor mere conclusions of fact.

We have critically examined the special verdict herein involved, and do not think that it is open to the objections urged against it by counsel. It follows very closely the allegations of the complaint and covers the facts in issue, and is unusually free from objectionable matter often found in special verdicts.

Certain evidence introduced by the appellees upon the trial was objected to by counsel for the appellants, and exceptions reserved. Among other items of evidence to which objection was made, was a certain mortgage, and a mechanic's lien upon the property of the poultry company, represented in part by the certificates of stock assigned to the appellees. The objection to these two items of evidence is, that the appellant George E. and Chandler were without knowledge of their existence when they made the representations.

There are two sufficient answers to this objection:

1. When the representations were made, the parties making them assumed that they were true, and will not be heard to say that they were uninformed as to their truthfulness.

2. It was a question for the jury as to whether or not the representations where known to be false when made.

The next day after the execution of the deed by appellees, the appellee, Jesse, went to Logansport and had a conversation with the appellant, George E., in regard to the encumbrances resting upon the poultry company's property, and in regard to other matters connected therewith.

The objections offered to this testimony are that George E. was but the agent of Chandler, and that any statement made by him after the contract was closed was incompetent because it was but mere hearsay testimony, and that it was wholly immaterial for the reason that it related to a time after the execution of the contract.

The theory of the appellees was, and is, that George E. furnished the consideration for the conveyance executed by the appellees, and was the real party in interest, although the conveyance was executed to Chandler. And as we have already intimated, George E. is a proper party to the suit because of his relation to the transaction involved, and this renders his statements competent to be proven as the admissions of a party.

The evidence was material so far as it related to the encumbrances on the property of the poultry company, as it tended to disprove the truthfulness of the representations alleged in the complaint. And what was said as to Chandler's financial condition was proper as indicating a willingness to delay the appellees in discovering the fraud.

The testimony of Mrs. Hobson, to which objection was made, related to the *res gestæ*, and was clearly competent.

Though Chandler had deceased before the trial his deposition was on file, and had the appellees otherwise been incompetent witnesses, this rendered them competent under

the second proviso in section 498, R. S. 1881; but the case is not one falling within the exception contained in the first proviso of this section.

No good purpose can be accomplished by a discussion of the evidence in this opinion, and hence it is only necessary to say that we find upon a careful examination of the record that the evidence supports the verdict.

We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 5, 1891; petition for a rehearing overruled April 8, 1891.

No. 16,157.

BRUNDAGE ET AL. *v.* DESCHLER.

JURY.—*Advisory.—Court may Disregard its Findings.*—In a case of equity jurisdiction where the court for its information submits certain questions of fact to a jury, the court is at liberty to disregard the answers of the jury to interrogatories, and to render judgment in disregard of the findings.

SAME.—*Instructions to.*—In cases where the finding of the jury is merely advisory, and in no sense binding on the court, it is doubtful if the reversal of a judgment because of instructions given to the jury in any such case would be advisable. Certainly not, where, as in the case at bar, the record affirmatively shows that the court did not follow the findings of the jury.

SPECIAL FINDING.—*When too Late to Request.*—After a general finding has been announced by the court, it is too late for a party to request the court to make a special finding.

From the Marion Circuit Court.

J. S. Duncan, *C. W. Smith*, *N. Morris*, *L. Newberger*, *J. B. Curtis* and *W. H. Jordan*, for appellants.

L. Howland and *D. W. Howe*, for appellee.

MCBRIDE, J.—This was a suit by the appellee against the

appellants, Brundage, Trusler, and Simpson, for specific performance of a contract to assign a lease for certain premises in the city of Indianapolis. The appellant, Bickley, was joined as a defendant, it being averred of him that he claimed some interest in the terms of said lease, the nature of which the plaintiff could not state.

The parties answered—

1. By general denial, and

2d. By special answer, alleging, in substance that before the issuance of the restraining order the lease in question had been sold and assigned to the appellant, Bickley, who purchased both the lease and a stock of goods at the time in the leased premises. That Bickley's purchase was made in good faith, for value, and that he claimed to be in possession and to hold the same as an innocent purchaser, etc.

The appellee replied by a general denial.

Although the case was of equity jurisdiction, the court, for its information, submitted certain questions of fact to a jury.

The jury returned answers to the interrogatories submitted. The record shows that thereupon the cause was submitted to the "court for final hearing, and finding upon the evidence" theretofore submitted to the court and jury, and that the "court, having heard argument upon the evidence, and duly considered thereon, and being sufficiently advised in the premises, and notwithstanding the answers of the jury to the interrogatories submitted to them by the court for its information, upon all the issues joined, finds for the plaintiff."

After the general finding had been announced the appellant, Bickley, asked the court to make a special finding of the facts. The court overruled the request on the ground that it came too late.

Judgment was rendered in favor of the appellee.

The assignment of errors is upon two grounds:

1st. That the court erred in overruling the motion for new trial.

2d. Overruling motions to modify the findings and judgment.

The first reason assigned for a new trial is that the decision of the court is not sustained by sufficient evidence. There was evidence tending to support the finding on every material point, and under our uniform practice we will not interfere on that ground.

The second reason assigned, that the decision of the court is contrary to law as it is argued, presents no question not embraced in the first assignment.

The third is, that the court erred in instructing the jury. As the verdict of the jury in cases of this character is merely advisory, and in no sense binding on the court, it is doubtful if the reversal of a judgment because of instructions given would in any such case be justifiable. Certainly not when, as in the case at bar, the record affirmatively shows that the court did not follow the findings of the jury. *Pence* v. *Garrison*, 93 Ind. 345 (354); *Koons* v. *Blanten*, 129 Ind. 383; *Sheets* v. *Bray*, 125 Ind. 33.

Counsel insist that as the Legislature has provided for calling a jury in such cases, the court having done so, and the jury having returned answers to interrogatories covering the entire issues, the court is not at liberty to disregard them and to render judgment in disregard of the findings. They say the answers to interrogatories "should be held to remain in the record, and control the general judgment unless regularly set aside, and when so set aside, the parties should have the same opportunity for a rehearing, as upon the granting of a motion for a new trial."

The right of a court of chancery to cause a question of fact to be tried by a jury for its information is not a new right created by the Legislature. The legislative sanction of this practice in section 409, R. S. 1881, is merely a recognition or possibly restoration of the old and time honored practice, and the course pursued by the court is fully justified by precedent.

The fourth reason assigned, that the court erred in overruling appellant's motion to modify the findings and judgment, is not argued and must be considered waived.

The appellant, Bickley, assigned as a reason for a new trial the overruling of his motion and request for special findings. This was not error. The request came too late.

The principal argument of counsel is addressed to the evidence, its sufficiency, and the inferences and conclusions proper to be drawn from it.

The argument is able, ingenious and forcible; but as we are precluded by the practice of this court from weighing conflicting evidence, we can not consider it. We find no error in the record justifying a reversal.

Judgment affirmed, with costs.

Filed Jan. 29, 1892; petition for a rehearing overruled April 19, 1892.

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No. 14,962.

Harshbarger et al. *v.* The Midland Railway Company.

Railroad.—*Construction of.—Damages.— Right of Action.— When and to Whom it Accrues.—Does not Descend to Heir.—Answer.*—In an action against a railroad company for the assessment of damages occurring by reason of the construction of a railroad across the lands of the plaintiff, which lands she inherited from her father and mother, an answer is good which pleads facts showing that the cause of action accrued long prior to the institution of plaintiff's suit, in favor of the then owner of the lands, and that the right to recover the damage vested in him at that time. The right of action accrued at the time when the ancestor might have maintained an action for the damages or instituted proceedings to have had his damages assessed. This he could have done as soon as the grade was completed through the land connecting with and constituting one continuous road-bed for many miles on either side of the land as shown by the finding of facts. Such a right is a chose

in action and does not descend to the heir as an incident to the real estate.

SAME.—*Evidence.*—*When Proper to Strike Out.*—In such an action it was not error for the court to strike out and take from the consideration of the jury certain evidence given on the trial with reference to the administration and settlement of the estate of plaintiff's father, the complaint proceeding upon the theory that the plaintiff claimed the right to have the damages assessed on account of being the owner of the real estate, and not upon the theory that her father owned the land at the time the cause of action accrued, and that the chose in action descended to her because she was the only child.

From the Montgomery Circuit Court.

J. Wright and *J. M. Seller*, for appellants.

T. F. Davidson, for appellee.

OLDS, C. J.—This proceeding was commenced by the appellants, Mary M. Harshbarger and Jacob M. Harshbarger, her husband, against the appellee for the assessment of damages occurring by reason of the construction of a railroad across the lands now owned by the said appellant, Mary M., which lands she inherited from her father and mother.

The alleged errors discussed are, that the court erred in sustaining appellee's motion for judgment on the special verdict; that the court erred in overruling appellants' demurrer to the second, seventh, eighth and thirteenth paragraphs of appellee's answer; and that the court erred in overruling appellants' motion for a new trial.

The facts found in the special verdict are, that the appellant, Mary M. Harshbarger, is now and was, on the 24th day of April, 1888, the owner in fee and in the full possession of the tract of land across which the railroad is constructed, particularly describing it; that she has been the owner of and in possession of the same since the year 1876; that one Henry Myers was the owner of said land and in the possession of the same continuously for more than twenty years immediately prior thereto; that Henry Myers died December 27th, 1875; that Hannah Myers, widow of Henry, died January 5th, 1876; that the said appellant, Mary M., was

the only child and sole heir of the said Henry and Hannah Myers; that in 1871 the Anderson, Lebanon and St. Louis Railroad Company surveyed a line of a proposed railway over and across said tract of land; that in 1873 said railway company entered upon said lands and built a grade upon and across the same, occupying for said purpose a strip of land one hundred feet in width, particularly describing it; that the appellee is the successor of the Anderson, Lebanon and St. Louis Railway, having become the owner of all its rights and franchises by the purchase at a foreclosure sale; that in 1887 the appellee entered upon the said lands, and said strip, and restored the grade theretofore existing, and laid down its ties and iron and has now, and had at the beginning of this proceeding, a railroad fully completed and in operation over and upon said land; that neither the appellee nor its predecessor ever obtained from Henry Myers, Hannah Myers or Mary M. Harshbarger any release of the right of way over and across said land; that neither the appellee nor its predecessor ever obtained from Henry Myers or any owner or part owner of said land any lease, license or permission to enter and appropriate said lands; that the strip of land so appropriated was, on the 24th day of April, 1888, of the value of $500; that the damages to the residue of said land were, on said 24th day of April, 1888, $1,075; that no part of said damages have ever been paid or tendered to the appellant or any person authorized to receive the same; that Jacob M. Harshbarger is the husband of the appellant, Mary M.; that the appellee, the Midland Railway Company, has accepted, ratified and adopted all the acts of its predecessor upon, about and concerning the lands in question; that said grade was a part of a completed and continuous grade for a distance of eighty miles on the east and seven miles on the west of said land; that Henry Myers had knowledge of the said work when it was being done and made no objection to the entry of said company on said lands, nor to the construction of said grade, except that

during the time said grade was being constructed said Myers sent word to the contractor, that unless the fences on said land were kept up he would put them off the premises.

The facts in this special verdict show that the Anderson, Lebanon and St. Louis Railroad Company entered upon the land in 1873, during the lifetime of Henry Myers, the then owner, and constructed the grade of a railroad across it, which grade was a part of a completed grade of a railroad near ninety miles in length; that the company entered upon the land, performed the work and constructed and completed the grade upon and across the land, with the knowledge and acquiescence of the then owner, Henry Myers; that the Anderson, Lebanon and St. Louis Railway Company mortgaged the property of the company, including the road-bed, and the appellee became the owner of and succeeded to all the rights of the old company by a foreclosure sale.

We do not think it appears that there was any abandoning of the rights acquired by the old company, but that the appellee took possession by virtue of its purchase as successor to the rights of the old company.

The recent decisions of this court are decisive of the questions presented.

The cause of action accrued in favor of Henry Myers, when the grade of the road was completed in 1873, and he might have maintained an action for the assessment of all damages sustained by reason of the construction of the road, and the damages resulting from the future operation of the road as well as those accruing at the time by reason of the construction of the grade.

In the case of the *Indiana, etc., R. W. Co.* v. *Allen*, 100 Ind. 409, it is held that where a railroad company takes possession and builds its road upon the lands of another, without appropriation or condemnation as the statute provides, the damages then accrue to the owner, and a subsequent conveyance of the whole tract gives to the grantee no right to any damages.

We do not think there was any error in overruling the demurrers to the answers.

The second paragraph pleaded the facts showing that the causes of action accrued in 1873, in favor of the then owner, Henry Myers, and the right to recover the damages vested in him at that time, which right it is said in *Indiana, etc., R. W. Co.* v. *Allen, supra,* is a chose of action, and it would not descend to the heir as an incident to the real estate, even if it were not barred by limitation. *Sherlock* v. *Louisville, etc., R. W. Co.,* 115 Ind. 22.

Each of the paragraphs of answer was good under the holding in the decisions above cited.

The next question discussed arises on the overruling of the motion for a new trial, and relates to the exclusion of certain evidence by the court.

The court struck out and took from the consideration of the jury, the evidence given on the trial with reference to the administration and settlement of the estate of Henry Myers.

The complaint, we think, proceeds upon the theory that there was an original entry upon the land by the appellee, and a construction of the railroad after the appellant, Mary M., became the owner and entered into the possession of the same, though there are some averments which might indicate that the pleader had in mind that if the claim for damages accrued in favor of Henry Myers at the time of the original entry by the Anderson, Lebanon and St. Louis Railroad Company, it would descend to the heir as an incident to the land, or that the heir would have a right to maintain an action for the damages, as the claim had been omitted from the administration of the estate of her father and mother, and such estates had been fully settled and the debts of each fully paid, but we think it is evident that the case proceeded upon the theory that the appellant claimed the right to have the damages assessed on account of being the owner of the real estate and not upon the theory that her father owned the land at the time the cause of action ac-

crued, and that the chose in action descended to her on account of being the only child. It is suggested by counsel for appellee that the special verdict was returned during the January term of the court, and the motion for a new trial was not made until during the March term, and that the verdict was not returned upon the last day of the January term, nor was the motion for a new trial filed on the first day of the March term, but we have omitted to consider this objection, as in any event there is no error in excluding the evidence.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 25, 1891.

ON PETITION FOR A REHEARING.

OLDS, J.—The appellee in this case took possession of the right of way previously graded through the lands of Henry Myers, father of the appellant, Mary M. Harshbarger, by purchase under a decree of foreclosure as successors to the rights of the original company that took possession and graded the roadway. The damages accrued to Myers and the right of action existed in his favor in his lifetime.

It is the settled law of this State that such right of action is not transferred to a purchaser of the real estate by deed of conveyance without a special assignment of the right of action for damages for the previous appropriation by a railroad company of a right of way. *Sherlock* v. *Louisville, etc., R. W. Co.*, 115 Ind. 22; *Evansville, etc., R. R. Co.* v. *Nye*, 113 Ind. 223.

If as settled by the decisions of this court it is a right of action existing in the owner at the time of the appropriation, and the creation of a right of action separate and distinct from the land, so that the right of action for the damages does not pass by a conveyance of the land, it follows as a necessary result, that such right of action does not

descend to the heirs on the death of the ancestor. Under the decisions it is a chose in action recoverable by the administrator and not by the heir.

The right of action accrued at the time when the ancestor might have maintained an action for the damages or instituted proceedings to have had his damages assessed. This he could have done as soon as the grade was completed through the lands connecting with and constituting one continuous road-bed for many miles on either side of the land as shown by the finding of facts.

The finding of facts clearly shows such an appropriation and use of the land by the railroad company in entering upon, taking possession and grading as to make it a part of one continuous road-bed nearly one hundred miles in length as to clearly have given Henry Myers, the then owner, a right to have maintained an action for damages, or to have instituted proceedings to have his damages assessed.

Petition for a rehearing overruled.

Filed April 20, 1892.

No. 15,702.

SINN v. KING.

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SURVEY.—*Boundary Lines.—Evidence of.—Statute Construed.* A survey made under the provisions of section 5955, R. S. 1881, is, during the period of three years thereafter, *prima facie* evidence of the corners and lines established thereby, and after that time, no appeal having been taken, it becomes conclusive evidence of the same.

EVIDENCE.—*Conflict of.*—See opinion.

From the Brown Circuit Court.

W. C. Duncan, for appellant.

F. T. Hord, M. D. Emig, R. L. Coffey and *N. H. Franklin*, for appellee.

MILLER, J.—This is a contest over a disputed boundary line, and involves the title to 16⅔ acres of land.

The case is before us on the weight of evidence, all other questions being waived by the failure of counsel for appellant to discuss them in his brief.

The quarter section of land, which includes the disputed territory, contains some sixty-seven acres in excess of the required number, and each of the parties claims a portion of this excess. The appellant insists that this excess should be apportioned to each subdivision of the quarter section; the appellee that the excess should go to the northern and exterior tier of lots.

It seems that no subdivisional survey of this quarter section was made until the year 1883, when the corners were established by the county surveyor, at the instance of the appellant. This survey not having been appealed from, it was during the period of three years as between the parties to such survey, and all persons claiming under them, *prima facie*, and after that time conclusive, evidence of the true location of such dividing line, so far as that could be determined by a survey. Section 5955, R. S. 1881; *Herbst* v. *Smith*, 71 Ind. 44; *Riggs* v. *Riley*, 113 Ind. 208.

The appellant insists that this survey does not affect the title acquired by twenty years' adverse possession of the land in dispute, by himself and those under whom he claims title.

Without discussing, or deciding, the legal question involved, it is sufficient to say that the land in dispute was wild and unfenced, and that the fact of such adverse possession was disputed by the appellee, and the finding of the court upon that point can not, at this time and place, be successfully controverted.

The appellant also contends that after the survey was made, and during the three years allowed him for appeal, the surveyor who made the survey dotted on the plat of the survey the line claimed by the appellant, and gave him a

statement in writing of the width, in rods, of the disputed strip of land; that the appellant went to the appellee and they cut a grape-vine, supposed to be a rod long, and with it measured off and divided the excess of land; that in pursuance of this agreement and grape-vine measurement, the appellant took possession of his portion of the land and waived his right of appeal. We have recently held that such an agreement with reference to a disputed boundary was founded upon a sufficient consideration, and enforceable. *Horton* v. *Brown*, 130 Ind. 113.

The appellee, while admitting this measurement, denies that it was to settle the dispute as to the boundary line, but simply to ascertain if some trees about to be cut were in the disputed territory. The evidence upon this question was conflicting, and we can not interfere with the conclusion arrived at by the trial court.

Judgment affirmed.

Filed April 20, 1892.

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131 185
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No. 15,471.

Quaack v. Schmid et al.

Mechanic's Lien.—*Furnishing Material.*—*Notice.*—*Sufficiency of.*—The notice required under section 1692, Elliott's Supplement (now repealed), to enable a person furnishing material to acquire a lien, need not be in writing. Mere information to the owner of a building that one is furnishing material to be used in its construction, or his personal knowledge of that fact alone, however acquired, is not sufficient ground upon which to base a lien. There must be some affirmative act or statement that will reasonably tend to put the owner upon his guard and afford him an opportunity to protect himself from loss.

Same.—*When Notice Must be Given.*—Where the material is, like brick, of such a nature that it may be used as fast as delivered, if notice is delayed until it has in fact been worked into and become a part of the structure, it is too late. A notice given after that time is not given at

the time of the delivery of the material. A notice given, however, while the delivery of the entire number of brick contracted for was in progress would be good as to the portion of the brick not then used, although delivered before the date of the giving of the notice. COFFEY, J., dissents.

SAME.—*Complaint.—Party to Whom Notice is Given.—Sufficiency of Averment as to.*—In an action to enforce a mechanic's lien against a church corporation, an averment in the complaint "that during the time the plaintiff was delivering and furnishing the bricks for said purpose, he notified the defendant corporation that he was furnishing the bricks for said structure," is sufficient without averring to what officer or person representing the corporation the notice was given. It is the statement of a fact and not of a legal conclusion.

SAME.—*Description of Property in Notice.*—A description of the property in the recorded notice is sufficient which describes it as follows: "Your church property at the southeast corner of Alabama street and Merrill street, in the city of Indianapolis, Indiana, as well as upon the new church building (house) recently erected thereon by you," although the numbers of the lots and the name of the county are not given. The complaint supplemented this description by averments making it full and specific. See Elliott's Supp., section 1690.

From the Marion Superior Court.

G. Carter, for appellant.

A. F. Denny, for appellees.

MCBRIDE, J.—In the summer of 1888 the appellee, a church corporation, let a contract to one C. Bender to furnish the material for, and erect a church building on real estate owned by the appellee in the city of Indianapolis. Bender sublet to one Wehking the contract for furnishing and laying all brick used in constructing the building. Wehking, in turn, contracted with the appellant to deliver to him, on the ground, one hundred thousand of the brick. After the delivery of seventy-six thousand of the brick the appellant saw John C. Schmid, who was one of the appellee's trustees, and a member of its building committee, and who had, by appellee's authority, a general supervision over the work, and told him that he had a contract with Wehking to furnish one hundred thousand brick for the erection of a building; that he had already delivered seventy-six

thousand of them; that Wehking had not paid him for them; that he did not know whether Wehking would want any more or not; and that he looked to the church to pay him.

At this time sixty-nine thousand of the brick already delivered had been built into the wall, and the remaining seven thousand were lying on the ground.

At this time, also, the appellant did not know but that he was to continue the delivery of the remainder of the one hundred thousand. He did thereafter deliver two thousand more brick, and was then notified by Wehking not to deliver any more, and did not. The seven thousand that were on the ground when the notice was given, with the two thousand afterwards delivered, were all used in the building. The appellant, having, in due time, filed in the recorder's office of the county a proper notice, sought by this suit to foreclose a lien on the church property for the entire seventy-eight thousand brick furnished by him and used. The court below foreclosed his lien for the nine thousand brick, but refused to foreclose it for any of the brick that had been laid in the walls before the notice was given. The appellant contends that this was error.

The appellee by cross-assignment of errors assails the judgment rendered, on the ground that under the facts, which were found specially, the appellant was not entitled to a lien for more than the two thousand brick delivered after the notice. Indeed, the appellee denies the right to any lien whatever, on the ground that the notice to Schmid was not sufficient under the statute.

The appellant rests his claim upon Elliott's Supp., section 1692 (now repealed). The section in question is as follows:

"To enable the mechanics or other persons furnishing material or performing labor, as above provided, to a contractor, to acquire such lien, he must at or before the time he furnishes the material or performs the labor, notify the

owner or his agent that he is furnishing the materials or performing the work for the contractor."

The notice required by this section need not be in writing. *Vinton* v. *Builders, etc., Ass'n*, 109 Ind. 351.

The position of appellant's counsel is, that the contract to deliver the one hundred thousand brick was an entire contract, and that a notice given at any time while the delivery of the entire number was in progress was a notice *at the time* of the delivery. His argument and the illustrations in support of it are plausible, but are more ingenious and skilful than convincing.

This court, in the case of *Neeley* v. *Searight*, 113 Ind. 316, in an opinion by MITCHELL, J., held that the purpose of the notice required by the section of statute in question was to enable the owner to take such steps for his own protection as he might deem prudent and necessary, under the terms of his contract with the contractor, so as not to be compelled to pay twice for the same benefit or improvement.

This purpose would be defeated if the notice might be delayed until after the material was not only delivered but actually used. In our opinion, when the material is, like brick, of such a nature that it may be used as fast as delivered, if notice is delayed until it has in fact been worked into and become a part of the structure, it is too late. A notice given after that time is not given at the time of the delivery of the material. The delivery is complete and a thing of the past when the article delivered has been accepted and used.

With respect to the seven thousand brick not yet used at that time we think a different rule should apply.

Assuming that the delivery was sufficient to vest title in Wehking, and that the appellant could no longer reclaim them, still they were within reach of process against Wehking, and could be seized and sold on execution against him to satisfy his indebtedness to the appellant. But by allowing Wehking to place them in the walls of the church after that

time the appellee aided in, or consented to, an act which placed them effectually beyond the reach of the appellant in any other way than that provided by the statute in question. They thereby became a part of the appellee's real estate. We think there is no injustice in so construing the statute as to hold, as the court below did, that notice given while the delivery of the entire number contracted for was in progress, was in time as to the portion not then used. This disposes of the questions over which the principal controversy has been waged. The appellee, however, on its cross-assignment of errors presents some additional questions.

The complaint contained the following averment: "That during the time plaintiff was delivering and furnishing the said bricks for said purpose, he notified the defendant corporation that he was furnishing the bricks for said structure."

The appellee moved the court to require the appellant to make his complaint more specific by averring to what officer or person representing the corporation the notice was given.

Counsel for the appellee says that the averment, the appellant "notified the defendant corporation," is a statement of a legal conclusion. In our opinion it is the statement of a fact, and is sufficiently full to meet the requirements of good pleading.

If the appellee desired additional or more explicit information relative to the matters which he thus sought to have incorporated into the complaint, he had an efficient means of obtaining it by interrogatories addressed to the plaintiff under section 359, R. S. 1881.

Counsel for the appellee also contend that the court erred in overruling a demurrer to the complaint.

The defects asserted as rendering the complaint fatally defective are: 1st. That above referred to, that the averment of notice is insufficient, and, 2d. That the description of the real estate in the recorded notice is not sufficient. In the recorded notice the property is described as follows: "Your church lot at the southeast corner of Alabama street and

Merrill street, in the city of Indianapolis, Indiana, as well as upon the new church building (house) recently erected thereon by you."

The numbers of the lots are not given, nor is the name of the county given. The complaint supplements this description by averments making it full and specific.

Section 3 of the act of March 3d, 1883, relating to this subject, Elliott's Supp., section 1690, provides that "Any description of the lot or land in a notice of lien will be sufficient, if, from such description or any reference therein, the lot or land can be identified."

In our opinion the description in the notice is sufficient, *McNamee* v. *Rauck*, 128 Ind. 59.

Counsel for the appellee also contends that the oral notice given by the appellant to Schmid was not sufficient.

Mere information to the owner of a building that one is furnishing material to be used in its construction, or his personal knowledge of that fact alone, however acquired, is not sufficient ground upon which to base a lien. *Neeley* v. *Searight*, *supra; Caylor* v. *Thorn*, 125 Ind. 201; *Newhouse* v. *Morgan*, 127 Ind. 436.

There must be some affirmative act or statement that will reasonably tend to put the owner upon his guard and afford him opportunity to protect himself from loss. *Newhouse* v. *Morgan*, *supra*.

In the case at bar the court finds that the appellant not only informed Schmid that he was furnishing the brick, but that he informed him that he had not been paid, and that he "looked to the church to pay him." This was sufficient.

We find no error in the record.

Judgment affirmed, with costs.

ELLIOTT, C. J., took no part in the hearing and decision of this case.

Filed Feb. 26, 1892; petition for a rehearing overruled April 20, 1892.

DISSENTING OPINION.

COFFEY, J.—I dissent from so much of this opinion as holds that the material man may acquire a lien for material furnished the contractor prior to notice to the owner of the building of his intention to acquire such lien.

Filed Feb. 26, 1892.

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No. 15,773.

WILSON ET AL. v. LOGUE ET AL.

HUSBAND AND WIFE.—*Tenants by Entireties.—Individual Debt of the Husband.—Suretyship.*—Where land is owned by husband and wife as tenants by the entireties, and the husband and wife sign a note and execute a mortgage on said land to secure the individual debt of the husband, the wife is only a surety, and the mortgage is void.

SAME.—*Wife's Suretyship.—Evidence Tending to Show.*—Where there is evidence tending to show that the note and mortgage in suit were executed to secure a loan made by the plaintiff to the husband, that the money was intended and was in fact used by the husband to pay his individual debts, and that the plaintiff knew at the time the loan was made that the money was borrowed for the use of the husband, the finding of the trial court that the debt evidenced by said note and mortgage was the separate debt of the husband, and that the wife was only surety, will not be disturbed.

SAME.—*Mechanic's Lien.—Material Purchased by Husband.—When Binding Upon Wife.—Recording Lien in Wrong Book.*—Where land is owned by husband and wife as tenants by the entireties, and the husband, with the knowledge of his wife and without objection on her part, purchases material to replace a barn on said premises destroyed by fire, and the wife was present when the material was delivered and used in the construction of the building, and made no objection, the party furnishing the material may acquire a lien against said property by filing a notice as required by law of his intention to hold a lien. The fact that the recorder recorded the notice in the wrong book does not vitiate the notice.

From the Union Circuit Court.

J. W. Conoway and *T. D. Evans*, for appellants.

L. H. Stanford, for appellees.

COFFEY, J.—This was an action in the Union Circuit Court by the appellant George Wilson to recover a personal judgment against the appellees upon a promissory note executed by them to him in the year 1886, and to foreclose a mortgage executed upon the real estate therein described to secure the payment of the note. The appellant Bond was made a party defendant because he claimed to hold a mechanic's lien upon the property.

The appellees answered that they were husband and wife and held the land described in the mortgage by entireties; that the note in suit represented the individual debt of the husband, and that the wife was only the surety thereon, and that the mortgage in suit was executed to secure the individual debt of the husband.

They also filed a cross-complaint setting up the same facts, and praying that the mortgage might be cancelled and their title quieted.

The appellant Bond filed a cross-complaint in which he set up a material man's lien for material furnished for the construction of a building on the mortgaged premises.

Upon issues joined the cause was tried by the court, and at the request of the appellants a special finding of facts, with the court's conclusions of law thereon, was filed.

The court found specially that the debt evidenced by the note in suit was the separate debt of the husband, and that the wife was only surety; that the land described in the mortgage was held by the appellees by entireties, and that no part of the debt secured by the mortgage is the debt of the wife. The court further found that the debt for which the appellant Bond sought a material man's lien was the separate debt of the husband, and that the notice of such lien had never been recorded in the miscellaneous records of Union county as required by law.

The principal question discussed by counsel for the appellant Wilson, in his brief, relates to the sufficiency of the evidence to sustain the special finding of the court.

The evidence on the part of the appellees tends to show that the note in suit was executed to secure a loan made by the appellant to the husband. The money was intended and was in fact used by the husband to pay his individual debts. That the money was borrowed for the use of the husband the appellant knew at the time he made the loan. It is true that there is evidence on behalf of the appellant tending to show that some of the money was paid over to the wife, but this was denied by the appellees. The weight of the testimony was for the circuit court. We can not undertake to weigh conflicting evidence.

This being the husband's debt and the wife having signed the note and mortgage as surety only, the mortgage was void, and the court did not err in its conclusions of law upon the facts stated in the special finding. *Dodge* v. *Kinzy*, 101 Ind. 102; *Stewart* v. *Babbs*, 120 Ind. 568; *Crooks* v. *Kennett*, 111 Ind. 347; *State, ex rel.*, v. *Kennett*, 114 Ind. 160; *Security Co.* v. *Arbuckle*, 119 Ind. 69; *McCormick, etc., Co.* v. *Scovell*, 111 Ind. 551; *Long* v. *Crosson*, 119 Ind. 3.

In the trial of the issue between the appellant Bond and the appellees, it was proven that the barn on the premises, described in the mortgage, was destroyed by fire, by reason of which it became necessary to construct a new one. For this purpose the husband purchased the material from Bond and used it in replacing the one destroyed. Within the time fixed by statute Bond filed with the recorder of Union county notice of his intention to hold a lien for such material. The husband, prior to purchasing the material, informed his wife of his intention to construct the barn, and she made no objections thereto. She was also present when the material was delivered and used in the construction of the building, and made no objection.

Under these facts we think she should not receive the aid of a court of equity to remove the lien for material used in the betterment of the property. It would be inequitable to

permit her to receive and retain the full benefit of material used in the construction of a barn upon her property, under the circumstances here disclosed, and refuse to pay for it. As she was fully informed as to the facts and made no objection, she should be held as assenting to the use of the appellant's material for her benefit and bound to pay for the same. *Dalton* v. *Tendolph*, 87 Ind. 490.

The appellan Bond acquired a lien upon the property by filing notice of his intention to hold a lien with the recorder of Union county. It is true the recorder recorded the notice in the wrong book, but this is not a defect which can not be cured. *Wilson* v. *Hopkins*, 51 Ind. 231.

In our opinion the circuit court erred in overruling the motion of the appellant Bond for a new trial.

Judgment affirmed as to Wilson, and reversed as to Bond, with directions to grant a new trial as to him.

Filed April 19, 1892.

No. 15,560.

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BLAIR v. BLAIR.

SPECIAL FINDING.—*Statement of Fact.—Exception to Conclusions of Law.—What it Admits.*—In a suit to recover the possession of land with damages for its detention, the court in its special findingof facts, after stating the reasonable rental value of the land for various periods, stated "that the damages accruing to the plaintiff by being kept out of the possession of said real estate from the date of said last demand to the time of the trial of this suit is the sum of two hundred dollars."

Held, that said final clause of the finding is a finding of fact, and not a conclusion of law.

Held, also, that an exception to the conclusions of law is an admission that the facts are fully and correctly found.

From the Carroll Circuit Court.

A. L. Kumler and *T. F. Gaylord*, for appellant.

J. H. Adams, for appellee.

McBride, J.—This was a suit to recover the possession of land, with damages for its detention.

The court, by request of the parties, found the facts specially and stated its conclusions of law.

The only error discussed by counsel is, that the court erred in its conclusions of law. The specific error complained of being in its award of damages.

The court made the following finding relative to damages: "That the reasonable rental value of said real estate for the farming year and season of 1890 is six hundred dollars; that the reasonable rental value of said real estate for the farming year and season of 1890, after the first day of May, 1890, is the sum of three hundred dollars; that the damages accruing to the plaintiff by being kept out of the possession of said real estate from the date of said last demand to the time of the trial of this suit is the sum of two hundred dollars." Upon this the court stated as its conclusion of law that the appellee was entitled to recover the sum of two hundred dollars damages.

The appellant insists that the latter clause of the finding is nothing more than a mere conclusion and should be disregarded, and that without it there is nothing upon which to base the conclusion of law.

We can not agree with the appellant. While possibly open to the objection that it is a general rather than a special finding, it is a finding of a fact and can not be disregarded. An exception to the conclusions of law is an admission that the facts are fully and correctly found. *Gregory* v. *Van Voorst*, 85 Ind. 108; *Helms* v. *Wagner*, 102 Ind. 385; *Bass* v. *Elliott*, 105 Ind. 517; *Kurtz* v. *Carr*, 105 Ind. 574; *Wynn* v. *Troy*, 109 Ind. 250; *Gardner* v. *Case*, 111 Ind. 494; *Warren* v. *Sohn*, 112 Ind. 213.

An objection that the finding on any issue is general, in-

stead of special, is not raised by an exception to the conclusion of law.

Judgment affirmed.

Filed April 19, 1892.

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No. 15,162.

HOLLAND *v.* HOLLAND ET AL.

PARTIES.—*Foreclosure of Mortgage.—Death of Mortgagor.—Supplemental Complaint.—Parties.*—In an action to foreclose a mortgage, if the mortgagor, or the owner of the equity of redemption, die, his administrator should be made a party defendant, if he enters no appearance, by a supplemental complaint and service of process.

SAME.—*Appearance.—Amending Complaint.—Demurrer by Administrator.*—In such an instance an appearance does not relieve the plaintiff from filing such additional pleading. The order-book entries, making the administrator a party, can not be resorted to in aid of the original complaint; and a demurrer by the administrator to the complaint for want of facts is well taken.

SAME.—*Foreclosure of Mortgage.—Wife of Owner of Equity of Redemption.—Death of Husband.*—The wife of the owner of the equity of redemption is a proper party in the foreclosure of a mortgage; and when he dies she is a necessary party. If the land has been conveyed by the mortgagor, then the wife of the grantee is a proper party defendant.

DEMURRER.—*Order-Book Entry, Varying Contents of.*—The order-book entry of the filing of a demurrer can not control the contents of the demurrer.

ESTATES.—*Action by Legatee Concerning Assets of Estate, Can not Maintain.*—A legatee, whether his legacy be specific, general or residuary, has no right, until the estate is settled, without the consent of the executor, to withdraw a portion of the assets of the estate liable for the payment of the debts of the testator, except as provided by statute, and he can maintain no action to recover such assets from a third party.

PRACTICE.—*Striking Out Pleading.—Making Part of Record.*—If part of a pleading is stricken out on motion, no error can be assigned thereon unless such part of the pleading is made a part of the record by a bill of exceptions.

SAME.—*Overruling Motion to Strike Out not Error.*—Overruling a motion to strike out a part of a pleading is not such an error as will reverse the case.

WITNESS.—*Competency of Mortgagee in Foreclosure Suit when Mortgagor is Dead.*—In a suit to foreclose a mortgage, where the mortgagor is dead, the mortgagee is not a competent witness to any matter which occurred prior to the death of the mortgagor.

ABATEMENT.—*Death of Mortgagor.*—*Continuing Action Against Administrator.*—In a suit to foreclose a mortgage, if the mortgagor dies, the action does not abate, but his administrator may be brought in by supplemental complaint, and the action continued against the mortgagor's estate. Sections 271, 2310, R. S. 1881.

APPEAL.—*Foreclosure of Mortgage.*—*Administrator a Party.*—In an action to foreclose a mortgage, where the mortgagor dies pending the action and his administrator is made a party defendant, an appeal therefrom is taken under the civil code, and not under the decedent's act.

From the Henry Circuit Court.

J. M. Brown and *W. A. Brown,* for appellant.

L. P. Newby and *M. E. Forkner,* for appellees.

MILLER, J.—This was an action by the appellant against the appellees to foreclose a mortgage.

The mortgage in suit was executed by the appellees, Welcome R. Holland and Maria Holland, his wife, to one John Holland, who afterwards assigned the mortgage, and the notes thereby secured, to the appellant.

The complaint alleged that the mortgagors had sold the mortgaged property to one Nathan B. Wade, who, as part of the purchase-money, assumed the payment of the notes secured by the mortgage. Nathan B. Wade and Amanda Wade, his wife, were made parties defendant in the action. At the time the suit was brought only one of the notes secured by the mortgage was due, but a foreclosure was asked for the whole debt due and to become due, without alleging in the complaint the non-divisibility of the premises.

At the first calling of the cause in court, the death of Nathan B. Wade was, by whom does not appear, suggested to the court, and James Hall, his administrator, was substituted as a party defendant. An appearance was entered for such administrator, and, on motion of the plaintiff, the defendants were ruled to answer the complaint.

No supplemental complaint was filed, nor was the original complaint amended so as to make the administrator a party to the pleading, or ask any relief against him. Subsequently Hall, as such administrator, demurred to the complaint, his demurrer was sustained, and this ruling is assigned as error.

We are of the opinion that the court did not err in sustaining the demurrer.

If no appearance had been entered for the administrator, the plaintiff would have been compelled, if he desired to bring him into the case, to file a supplemental complaint and have him served with process. Sections 271, 274, 277, R. S. 1881. The appearance waived the service of process, but did not dispense with additional pleadings. The whole spirit of our code of practice shows that the Legislature intended that a complaint, to be good on demurrer, should, unaided by the order-book entries, state a cause of action against each of the defendants. This the complaint did not do, and it was, therefore, subject to a demurrer filed by the defendant against whom no cause of action was stated.

A demurrer to the complaint was also filed by the defendant Amanda Wade, and sustained by the court, and exceptions taken.

This defendant was the wife of the owner of the equity of redemption, and upon his death his widow, and so far as we know his only heir. She was a necessary party to the suit which asked for a foreclosure of the mortgage. *Curtis* v. *Gooding*, 99 Ind. 45; *Watts* v. *Julian*, 122 Ind. 124; *Daugherty* v. *Deardorf*, 107 Ind. 527; *Pauley* v. *Cauthorn*, 101 Ind. 91.

We have been unable to discover any defect in the statement of the cause of action against this defendant, and none is pointed out by the appellees in their brief.

The defendant Maria Holland demurred to the complaint, and her demurrer was sustained.

The premises described in the mortgage having been sold by the appellee Welcome R. Holland, and conveyed to

Nathan B. Wade before the bringing of this suit, the appellee Maria, who was the wife of Welcome R., while not a necessary was a proper party defendant (*Petry* v. *Ambrosher*, 100 Ind. 510), and as such the complaint states a cause of action against her.

The appellee insists that no demurrer was filed by this defendant to the complaint, but we are unable to agree with counsel in this position. The demurrer on its face purports to be filed by all the defendants, and will control the statement made by the clerk, which omits the name of Maria Holland as one of the demurring parties.

The defendant Maria Holland filed a cross-action against the plaintiff in which she claimed that the assignment of the notes and mortgage, from the mortgagee to the plaintiff, had been procured by fraud and undue influence, and without consideration, and that afterwards the mortgagee, John Holland, by his last will and testament devised them to her; that the testator died and his will had been duly probated. The prayer in the cross-action is that the pretended assignment be set aside, and that whatever judgment should be rendered in the cause against her co-defendant should be in her favor and not in favor of the plaintiff.

The pleading is a peculiar one, and does not exhibit either the mortgage or notes, nor does it show that the estate of the testator has been settled; his debts paid; or that the notes and mortgage have been, by his executor, turned over to the legatee.

Upon the assumption that the notes belonged to John Holland at the time of his death (and this is the position assumed by the cross-complainant), they became a part of his personal estate and liable for the payment of his debts. A legatee, whether his legacy be specific, general or residuary, has no right, until the estate is settled, without the consent of the executor to withdraw a portion of the assets liable for the payment of the debts of the testator, except as provided by statute. Section 2378, R. S. 1881, *et seq.* And

has no standing in court to maintain an action to recover such assets from a third party. *Crist* v. *Crist*, 1 Ind. 570; *Highnote* v. *White*, 67 Ind. 596; *Gould* v. *Steyer*, 75 Ind. 50; *Fickle* v. *Snepp*, 97 Ind. 289.

It follows that the court erred in overruling the demurrer to this cross-complaint.

The record informs us that on motion of the defendant Welcome R. the court struck out of the complaint the notes that had not matured at the commencement of the suit; also that a motion made by the plaintiff to strike out parts of the pleadings of the adverse party was overruled. The motion to strike out the ruling, and the part struck out, are not brought into the record by a bill of exceptions, and, therefore, no question is presented for the consideration of this court. *Berlin* v. *Oglesbee*, 65 Ind. 308; *Laverty* v. *State, ex rel.*, 109 Ind. 217.

Overruling the motion to strike out part of a pleading would not, even if erroneous, authorize us to reverse the judgment. *Gill* v. *State, ex rel.*, 72 Ind. 266; *Sprague* v. *Pritchard*, 108 Ind. 491.

The court correctly ruled that the plaintiff was not a competent witness to any matter which occurred prior to the death of John Holland.

It is evident from the form of the judgment, as well as the rulings of the court in making up the issue, that the cause was tried upon the assumption that, upon the death of Nathan B. Wade, so much of the action as asked for the foreclosure of the mortgage abated.

We do not so construe section 2310, R. S. 1881, which is cited in support of this position. It provides that "No action shall be brought by complaint and summons against the executor or administrator of an estate, for the recovery of any claim against the decedent."

Section 271, of the code, which went into force on the same day, says: "No action shall abate by the death or

disability of a party, * * if the cause of action survive or continue."

The construction contended for by the appellees would put these two sections of the statute into irreconcilable conflict. Full force and effect can be given both enactments by holding, as we do, that section 2310 relates to the bringing of actions, and not to the continuance of those brought prior to the death of the deceased; and that when such actions have been instituted, section 271 forbids their abatement upon the subsequent death of a party.

The appeal in this case was well taken under section 633 of the code of practice, and is not governed by section 2454, R. S. 1881, and Elliott's Supp., section 417. The action was for the foreclosure of a mortgage, and is not simply a matter growing out of a matter connected with a decedent's estate. *Mason* v. *Roll*, 130 Ind. 26.

The motion to dismiss the appeal is overruled, and judgment reversed.

Filed April 19, 1892.

No. 15,772.

SMITH, TREASURER, *v.* THE UNION COUNTY NATIONAL BANK.

TAXATION.—*Enjoining Collection of Taxes.—Part Valid.—Tender or Offer to Pay Must be Shown.*—Where the complaint shows that part of the taxes the collection of which is sought to be enjoined are valid, and there is no offer or tender to pay them, the complaint can not withstand a demurrer for want of facts.

From the Union Circuit Court.

J. D. Evans, for appellant.

L. H. Stanford, for appellee.

ELLIOTT, C. J.—The appellee avers, in its complaint, that

it is a national bank incorporated under the laws of the United States; that it is located in the town of Liberty, in Union county, and that its stockholders are residents of that county; that its paid-up capital stock is fifty thousand dollars, divided into five hundred shares of one hundred dollars each; that it owns a town lot of the value of eighteen hundred dollars; that on the 8th day of May, 1889, its cashier made out a correct and true statement, in duplicate as required by law, showing therein the number of shares of its capital stock, the names and residence of its stockholders, the number of shares owned by them respectively, and the fair cash value of each share, as well as the fair cash value of the entire capital stock of the bank, on the 1st day of April, 1889; that in the statement each share of stock was valued at one hundred dollars, and the entire capital stock at fifty thousand dollars; that the assessor to whom the statement was delivered made return to the county auditor on the 8th day of May, 1889; that on the list, or statement, a credit was noted in favor of J. C. Kitchell, a shareholder, for seven thousand dollars, that sum representing the indebtedness of the shareholder Kitchell; that the credit so claimed reduced the stated value of the capital stock to forty-three thousand dollars; that on the 17th day of June, 1889, the county board of equalization, then in session, made and caused to be entered of record an order changing the assessment by increasing the valuation of the capital stock to seventy-five thousand dollars; that neither the bank nor its stockholders were given any notice whatever; that the assessment as made by the board was placed on the tax duplicate and the duplicate delivered to the appellant, the treasurer, who threatens to collect the assessment.

There is at least one fatal defect in the complaint. There is no offer or tender of the amount of the taxes due upon the property returned for taxation. The complaint concedes that taxes upon at least forty-three thousand dollars of the capital stock are valid, and without payment or tender of

those taxes there can be no cause of action, even conceding that the increase in the valuation by the board of equalization was void. *Smith* v. *Rude Bros., etc., Co., ante,* p. 150, and cases cited; *Morrison* v. *Jackoby,* 114 Ind. 84; *Hewett* v. *Fenstamaker,* 128 Ind. 315. For the reason given, if for no other, the court erred in overruling the demurrer to the complaint. We shall neither consider nor decide any other objections to the complaint, inasmuch as no others are urged by the appellant's counsel. As the complaint is bad, and must be so adjudged, it is unnecessary to examine or decide the questions made upon the special finding, although it is proper to say that the finding does not show payment or tender of any part of the taxes.

Judgment reversed.

Filed April 9, 1892.

No. 15,609.

The Toledo, St. Louis and Kansas City Railroad Company v. Stephenson, Trustee.

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Constitutional Law.—*Penalty for Obstruction of Highway, Validity of.*—A statute providing a penalty for the obstruction of a public highway, and also providing that the penalty shall be payable to the trustee of the township for the benefit of the public highways of the township, is not invalid because such penalty is not payable to the common school fund of the State.

Practice.—*Amendment of Complaint After Evidence Heard.*—It is not error to allow an amendment to a complaint after the evidence is heard, even though such amendment has the effect to make a bad complaint a good one.

Continuance.—*Absent Witness.—Diligence Must be Shown by Party Applying.* —An affidavit which shows that the attorney of the party applying for a continuance, because of absent witnesses, has been diligent to secure their attendance, is not sufficient, unless it also shows that the party himself has been diligent to procure their attendance; and this is true where the affidavit for such continuance is made by the attorney.

PLEADING.—*Action to Recover Penalty.—Each Day a Separate Offence.—Paragraphs.*—In an action for the recovery of a penalty for an offence which is shown to be continuous, the penalty being fixed at so much for each day of its continuance, it is not necessary to declare in separate counts for each day's penalty, but all may be grouped together in one count, covering the entire period.

From the Montgomery Circuit Court.

S. O. Bayless, *C. G. Guenther* and *C. Brown*, for appellant.

A. D. Thomas and *J. L. Shrum*, for appellee.

McBRIDE, J.—This was a suit to recover a penalty for obstructing a highway, under section 23 of the highway act of March 2d, 1883. Elliott's Supp., section 1565.

It was commenced originally before a justice of the peace of Montgomery county, and comes to this court because the constitutionality of the statute is challenged. The ground upon which the statute is assailed is, that it provides for the recovery of a penalty which goes to the trustee of the township for the benefit of the highways of the district, while the appellant insists that penalties should go to the common school fund alone, for the reason that the Constitution provides that the common school fund shall consist, among other things, of "the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue." Section 2, article 8.

The objection to the constitutionality of the statute is without foundation. The constitutional provision in question has reference to fines assessed in criminal prosecutions, and not to penalties recoverable in civil actions. *Burgh* v. *State, ex rel.*, 108 Ind. 132 (135).

The sufficiency of the complaint was challenged by demurrer in the circuit court on the ground that it did not state facts sufficient to constitute a cause of action; the specific defect being that it did not aver that the obstruction to the highway in question was "unnecessary and a hindrance to passengers." The demurrer was overruled, but, after the

evidence was in, the court permitted the plaintiff to amend by inserting the averment in question. The action of the court in permitting the amendment is also questioned as having been an abuse of discretion, and beyond the power of the court to grant.

Without that averment the complaint was fatally defective, and the demurrer should have been sustained. *Nowels* v. *Alter*, 53 Ind. 18.

In our opinion, however, the amendment subsequently made cured the error. It must be remembered that this action was commenced before a justice of the peace, and was, therefore, governed in the circuit court by the rules of practice prevailing in a justice's court. In that court, very properly, very liberal rules prevail relating to the amendment of pleadings.

The statute provides that either party may be permitted to amend his pleadings before or during the trial with the right to the opposite party to a continuance if the amendment requires or permits proof which he could not otherwise introduce. As the amendment in question changed a complaint which was fatally defective to one which was good, we think the appellant would have been entitled to a continuance at the costs of the appellee if he had asked it, but that it was within the power of the court, and not an abuse of its discretion, to permit the amendment.

It is also urged that the complaint is defective upon other grounds: That it is not shown where the obstruction occurred, or in what county or township, or road district it occurred. We think, fairly construed, all of these facts are shown by the complaint.

The appellant moved for a continuance of the cause because of absent witnesses, but the court overruled the motion. The absent witnesses were employees of the appellant, and were, of course, both within its control. As an excuse for not taking their depositions it was shown that upon application to the proper officers of the company by the attorney

they promised the personal attendance of the witnesses. The affidavit for a continuance shows diligence upon the part of the appellant's attorneys as between them and their clients, but shows no excuse for the failure of its officers to keep their promise to have the witnesses present. The showing was not sufficient, and the court did not err in overruling the motion. The complaint charged the obstruction of the highway by the construction of the appellant's railroad over it, and so low that travellers could not pass under its bridge, and that it had dug out and carried away the road-bed of the highway for a distance of forty feet, leaving a hole of that size into which the water flowed and accumulated to such an extent that it made the road impassable; that this was done July 5th, 1889, and continued to the 11th day of August, 1889.

The statute prescribes as the penalty in such cases five dollars, but provides that if the obstruction is continued five dollars may be recovered for each day it is continued. The appellant moved to require the appellee to separate the complaint into paragraphs, contending that as each day the obstruction was continued constituted a separate offence, it also constituted a separate and distinct cause of action, and that each should be separately stated and numbered.

Where the action is for the recovery of a penalty for an offence which is shown to be continuous, the penalty being fixed at so much for each day of its continuance, it is not necessary to declare in separate counts for each day's penalty, but all may be grouped together in one count, covering the entire period.

The appellant filed an answer in two paragraphs, the first being the general denial, and the second a special plea. The circuit court sustained a demurrer to the special plea. This was not error. Every material fact averred in the special plea could have been proven under the general denial. Indeed, the cause originating as it did before a justice of the peace they were provable without plea.

The only other question argued is the sufficiency of the evidence to sustain the verdict. There is evidence to support it, and we will not consider its weight. That question was for the jury alone.

Judgment affirmed, with costs.

Filed April 20, 1892.

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No. 15,766.

ESSICK ET AL. v. CAPLE.

WILL.—*Conditional Fee.—Meaning of Word "Heir."—Death of Child Divesting Estate.*—A testator bequeathed to his daughter a tract of land on the condition that if she should die, leaving no heirs to her, then the land was "to revert back to" the testator's "estate, and be divided equally among his" heirs, and the same was not to be sold or conveyed until after there "should be an heir born to the body of said daughter."

Held, that the word "heir" meant "child," that the will vested in the daughter a conditional fee in the land subject to become absolute upon the birth of a child to her; and that the death of such child before her death did not divest her of her estate in the land.

Held, also, that where a child was born to the devisee the condition ceased to exist, and that an absolute power of disposition and a limitation over are inconsistent with each other.

From the Miami Circuit Court.

J. Mitchell, M. L. Essick, and *O. F. Montgomery*, for appellants.

D. P. Baldwin and *M. R. Smith*, for appellee.

COFFEY, J.—This was an action by the appellants against the appellee to quiet title to the land described in the complaint.

It is alleged in the complaint that Samuel Essick died testate in the year 1878, seized in fee of the land in controversy, leaving as his only heirs at law and legatees the appellants and Amanda G. Caple, who was the wife of the appellee, Al-

fred Z. Caple, that the testator devised the land to his daughter Amanda by the sixth clause of his will, which is as follows:

"I will and bequeath to my daughter, Amanda G. Caple, in addition to what I have given her, the north half of the northeast quarter of section twenty-four (24), in township twenty-nine (29), range four (4) east, in Miami county and State of Indiana, containing eighty acres, more or less; and in the event that my daughter, Amanda G. Caple, should die having no heirs born to her, then the above described land is to revert back to my estate, and be divided equally among my heirs, and the same is not to be sold or conveyed until after there shall be an heir born to the body of said daughter Amanda." That after the death of the said Samuel Essick Amanda had born to her three children, who all departed this life prior to her death; that the said Amanda G. Caple died in the year 1889, leaving no children surviving her, having devised the land to her husband, the appellee.

The court sustained a demurrer to the complaint setting up these facts, and the question presented for our decision relates to the correctness of this ruling.

It is contended by the appellants that the will of Samuel Essick vested in his daughter Amanda a conditional fee in the land in dispute, subject to termination in the event she should die without living heirs born to her during her life, while on the other hand it is contended by the appellee that such will vested in the daughter a conditional fee in the land subject to become absolute upon the event she should have children born to her at any time before her death.

We think there is no doubt that the will of Samuel Essick vested in his daughter a conditional fee in the land, and the controversy between the parties is narrowed to an inquiry as to the nature of the condition. *Outland* v. *Bower*, 115 Ind. 150; *Huxford* v. *Milligan*, 50 Ind. 542; *Bruce* v. *Bissell*, 119 Ind. 525; *Amos* v. *Amos*, 117 Ind. 19; *Shimer* v. *Mann*, 99 Ind. 190; 2 Jarman Wills (ed. 1859), p. 83.

In our opinion the will vested in Amanda a conditional fee, subject to become absolute upon the birth of a child to her during her life. It is well settled that the word "heir" will be construed to mean child when it is plain that the testator employed it in that sense. *Shimer* v. *Mann, supra; Conger* v. *Lowe*, 124 Ind. 368; *Stevens* v. *Flannagan, ante*, p. 122.

That the testator used the word "heir" in the sense of child is manifest from the phrase, "and the same is not to be sold or conveyed until after there shall be born an heir to the body of said daughter Amanda."

The right to sell and convey the property was suspended until the birth of a child, but after that event the absolute right to sell and convey the land existed. When that event occurred the condition ceased to exist, for an absolute power of disposition and a limitation over are inconsistent with each other. The rule is, in such cases, that when the first taker has an absolute power of sale, subsequent limitations over are repugnant and void. *Outland* v. *Bowen, supra; Gifford* v. *Choate*, 100 Mass. 343; *Hale* v. *Marsh*, 100 Mass. 468; *Van Gorder* v. *Smith*, 99 Ind. 404.

The limitation contained in this will has no reference to the time at which the devisee shall die, but has reference to an entirely different event, namely, the time at which a child shall be born to her. We could not sustain the contention of the appellants without adding words not found in the will, or changing those used, and this is never to be done unless there is an imperious necessity for it. *Shimer* v. *Mann, supra*.

In our opinion the complaint in this case fails to show title to the land in dispute in the appellants, and for this reason the court did not err in sustaining a demurrer thereto.

Judgment affirmed.

Filed April 9, 1892.

No. 15,222.

131 210
154 248

Richardson v. Coleman.

Instruction to Jury.—*Advocating a Compromise Verdict.*—A clause in an instruction is erroneous which states to the jury, after it has been deliberating upon its verdict some time, that "The law which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and fair concessions." The law does not expect any compromise on the part of jurors. It expects every juror to exercise his individual judgment, and that when a verdict is agreed to it will be the verdict of each individual juror.

From the Marion Superior Court.

P. S. Kennedy, *S. Kennedy* and *H. J. Milligan*, for appellant.

S. J. Peelle and *W. L. Taylor*, for appellee.

Olds, J.—This was an action by the appellant against the appellee for damages received by the appellant while working in the heading factory of the appellee, alleged to have resulted by the negligent use of a belt, and from weak and insecure fastenings with which the same was put together.

There was a trial by jury and the jury was instructed and retired to deliberate. Afterwards the court called the jury into court and gave them instruction numbered eight, in the giving of which it is contended by the appellant that the court erred.

The evidence is not in the record, but all of the instructions are in the record, as provided by section 535, R. S. 1881.

It is suggested by counsel for appellee that the question must be presented as provided by section 630, R. S. 1881, for the presentation of reserved questions of law, but in this counsel are in error. There is no attempt to bring the case to this court under section 630, *supra*, and it was not necessary that it should be brought under the provisions of that section.

There was a verdict returned, a motion for a new trial

filed and overruled, exceptions were reserved to the ruling and judgment rendered. The case is appealed in the ordinary way, but the record does not contain the evidence.

If the instruction complained of was competent under any phase of the evidence which might have been introduced, then the judgment must be affirmed, but the particular instruction complained of has no relation to the evidence; hence it would have only encumbered the record to have included it. The instruction reads as follows:

"*Eighth.* In addition to the instruction which I have heretofore given you, I now desire to say that you are to take the law as given you by the court, and not to be swayed by any speculations of your own as to what the law is or ought to be. You are, however, the judges of the credibility of the witnesses, and should weigh and consider the evidence as I have heretofore indicated. It is important to the parties to have this case decided. You will, I trust, in your deliberations, be careful to avoid the influences of undue pride of personal opinion. The law which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and concessions. You will remember, gentlemen, that absolute certainty is not always attainable in human affairs, neither does the law require it. Whilst it is expected that there will be individual opinion, judgment and conscience, it is also expected that it will not go to the extent of unreasonable obstinacy. You will return to your room and again confer together, calmly and deliberately reviewing the case under the instructions I have given you."

The main portion of this instruction we do not deem objectionable. As to the propriety of having the jury brought into court after they had deliberated for nearly twenty-four hours and giving the instruction, we need not speak, and there is only a portion of the instruction that we deem it necessary to consider.

By one clause of the instruction the jury are told that

"The law which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and fair concessions." We can not give our sanction to this statement of the law. By it the jury are told that the law "expects and tolerates reasonable compromise." The law does not expect any compromise on the part of jurors. It expects every juror to exercise his individual judgment, and that when a verdict is agreed to it will be the verdict of each individual juror. In arriving at a verdict a juror should not indulge in any undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors, and listen to their arguments with a willingness to be convinced, and to yield to their views if induced to believe they are correct; but the law does not expect, nor does it tolerate, the agreement by a juror upon a verdict unless he is convinced that it is right—in other words, unless it is his verdict, a verdict which his conscience approves, and he, under his oath, after a full consideration, believes to be right. To say that jurors may compromise upon a verdict is to say that twelve jurors, all differing widely in their views as to what verdict ought to be returned, without any of them changing their views, may agree upon a verdict which is not believed to be right by any considerable number of the jurors, but agreed to as a matter of expediency in order to dispose of the case without the approval of the consciences of any considerable number of the panel approving of it.

The instruction tells the jurors the law expects them to make concessions and compromises, and agree upon a verdict which their consciences do not approve, but they should do so as a matter of expediency in order to dispose of the case.

The opinion in the case of *Clem* v. *State*, 42 Ind. 420, sustains the views we have expressed. It is true that decision was rendered in a criminal case, but a verdict, whether in a civil or criminal case, must be the verdict of all the jurors. Thompson Trials, section 2303.

In the case of *Houk* v. *Allen*, 126 Ind. 568, after the jury had been out some twelve hours, the jurors agreed that a certain number of ballots be cast and counted, and if either the plaintiff or the defendant received a majority of the ballots so cast, that the verdict should be returned for the party receiving a majority, and the agreement was carried out, and a verdict returned in accordance with the agreement. This court held that a verdict could not be arrived at in that way, and in the opinion it is said : "It is very clear, we think, that the rights of the parties were not determined according to the judgment or consciences of the members of the jury, as was their right, but that the verdict was the mere creature of the agreement to which jurors bound themselves in advance of the verdict." And yet this method of arriving at a verdict was but a compromise, the result of a concession made by the jurors; they could not agree upon a verdict; they differed as to whether the verdict should be for the plaintiff or the defendant, and after having deliberated for twelve hours, they compromise upon a verdict, and agree that it shall be reached in a certain way, and in doing so they return a verdict which is not approved by the judgment and conscience of the minority of the jurors, and the court says it is illegal.

Under the instructions given in this case the jury may have entered into a like agreement, and compromised upon a verdict to be arrived at in like manner.

In the case of *Goodsell* v. *Seeley*, 46 Mich. 623 (41 Am. R. 183), the court, in speaking of jurors compromising, says: "The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement." *Randolph* v. *Lampkin* (Ky.), 18 S. W. Rep. 538.

We have examined the authorities cited by counsel for appellee, and they do not sustain the instruction, and we have found none that do.

The other part of the instruction, other than that which we have commented upon, while not erroneous in itself, yet when taken together with the part that is erroneous, tended to add stress to the words "expect and tolerate reasonable compromise and fair concessions;" and we think the instruction would fairly lead the jurors to believe that, having deliberated twenty-four hours, and being unable to agree, they had the right to compromise upon a verdict, and return it, although it did not meet the approval of the consciences of the individual jurors. This instruction was not proper under any state of the evidence, and the judgment must be reversed.

Judgment reversed, at costs of the appellee.

ELLIOTT, C. J., took no part in the decision in this case.

Filed Jan. 14, 1892; petition for a rehearing overruled April 9, 1892.

No. 15,388.

STINGLEY v. NICHOLS, SHEPARD & CO. ET AL.

DAMAGES.—*Ditch Assessment.—Appeal Bond.—Sufficiency of.*—In an appeal from an assessment made against the land-owners along the main ditch, and also along the south arm thereof for the amount expended for repairs on the ditch, it is not necessary that the lands assessed from which the appeals are taken should be described in the appeal bonds, the appeals having been taken separately, nor need the bonds state whether the lands were assessed for repairs to the main ditch or to the south arm. It was proper to name the county surveyor as the obligee in the appeal bonds, although the assessments were made by a deputy surveyor.

SAME.—*Right of County to Defend.—Refusal to Permit.—County Surveyor.*—Where appeals are taken from ditch assessments, the county being the party and the only party financially interested in the collection of these assessments, it is proper for the board of county commissioners to employ attorneys to appear and protect the interests of the county in said appeals, and it is error for the court to refuse to permit such attorneys

to represent the county surveyor. Where, however, said attorneys did appear for the party who made the assessments, and continued the litigation, the error is not available.

SAME.—*Burden of Proof.*—In such appeals the burden of proof is upon the county surveyor, and it is not error to require him to open and close the case.

SAME.—*Board of County Commissioners.—Power to Appoint Deputy Surveyor.—Sufficiency of Appointment.—Collateral Attack.*—The power to appoint a deputy to act in cases wherein the regular surveyor is interested is specially delegated to the board of county commissioners. When they have made such appointment, the presumption exists, at least upon a collateral attack, that the county surveyor was interested in a matter wherein he was required to act, and that the board had knowledge of the fact. It is not necessary to recite the grounds upon which a board of county commissioners proceeds in a matter which is within their jurisdiction. An order of appointment by a board of commissioners which recited that the board appointed "A. R. as deputy surveyor for Fulton county, Indiana, in compliance with section 5952, R. S., 11th specification, section 140, R. S 1881," was broad enough to include the making of assessments for ditch repairs, and sufficient to withstand a collateral attack.

From the Fulton Circuit Court.

G. W. Holman, *R. C. Stephenson*, *J. Rowley* and *M. A. Baker*, for appellant.

P. M. Buchanan, *J. S. Slick*, *M. L. Essick* and *O. F. Montgomery*, for appellees.

MILLER, J.—A public ditch, known as the Peters and Reed ditch, was established in Fulton county, Indiana, in the year 1880, by the board of commissioners of that county, under and pursuant to the drainage law of 1875. In the year 1888, James K. Stinson, then surveyor of Fulton county, undertook to clean out and repair the ditch, as provided for by section 10 of the acts of 1885, p. 141 (Elliott's Supp., section 1193). For work done on the main ditch he issued certificates in the amount of $3,594.89, and for work on the south arm for $267.10, upon which sums the county auditor drew his warrant on the county treasurer, and the same were paid out of the county revenue. Afterward the

term of office of Stinson, as county surveyor, expired, and he was succeeded by the appellant, Peter J. Stingley.

In September, 1889, one Isaiah Walker, claiming to act as deputy surveyor, assessed the land-owners along the main ditch, and also along the south arm for the full amount expended for repairs on the ditch. This assessment was made to reimburse the treasury for the payments paid out of the county revenues.

From this assessment the appellees appealed to the circuit court by filing their separate bonds with the clerk of said court. Subsequently, by order of the court, the cases were consolidated and tried together.

After the appeals were perfected, but before the trial, Messrs. Holman & Stephenson and Rowley & Baker, attorneys at law, entered a special appearance in each case, and filed written motions to dismiss the appeals, which motions were overruled, and the rulings are assigned as errors here.

The grounds upon which the motion proceeded, briefly stated, are, that the assessment having been made by Isaiah Walker, and not by the appellant, Stingley, the appeal bonds should have been made payable to Walker, and he should have been made defendant in the appeal; and for the further reason that the lands assessed, from which the appeals are taken, are not described in the appeal bonds, nor do they state whether they were assessed for repairs to the main ditch or to the south arm.

We are satisfied that the court did not err in overruling these motions.

The purpose for which appeal bonds are required to be filed is to furnish indemnity for loss that may be incurred because of the appeal. Defects in their form are cured by statute. Section 1221, R. S. 1881; *Railsback* v. *Greve*, 58 Ind. 72. They are not pleadings and perform none of the functions of a pleading. The bonds seem to be drawn in strict conformity with the law giving the right of appeal. The record of the assessments, a copy of which the surveyor is

required to file with the clerk of the court to which the appeal is taken, necessarily shows a description of the lands assessed, with the purpose of the assessment.

The county surveyor was properly named as the obligee in the appeal bonds, for so says the statute which provides for the appeal.

If Walker, who made the assessment, had authority to make it, it was because he was a deputy surveyor. If he was a deputy surveyor, he was but the shadow of his principal—a mere substitute for his principal. Black Law Dict., title, "Deputy;" Sections 5952, 5569, 5570, R. S. 1831.

Upon the overruling of the motion to dismiss the appeals, a motion, supported by affidavit, was filed, questioning the authority of Messrs. Holman & Stephenson and Rowley & Baker to appear as the attorney of the county surveyor. In answer to this affidavit and motion, a joint affidavit was made by the attorneys mentioned, showing that they had been employed by the board of commissioners of Fulton county to appear and protect the interests of the county in said appeals, and to take such other steps as they should think proper and necessary to collect the amount of the assessments made to reimburse the county treasury for its disbursements made in the repair of the ditch.

The court found that such employment did not authorize them to appear in the action.

In our opinion this ruling was erroneous. The county was the party, and the only party, financially interested in the collection of these assessments. The money had been paid out of the county treasury, and the collection of the assessments appealed from was the only remedy provided by law for replacing it. While under the peculiar wording of the section of statute under consideration the county was not a necessary party to the appeal (*Davis* v. *Lake Shore, etc., R. W. Co.*, 114 Ind. 364), we think it would have been a proper one, and upon proper application should have been permitted to intervene for the protection of its rights in litigation.

Goetzman v. *Whitaker*, 81 Iowa, 527; *Smith* v. *Ford*, 48 Wis. 115 (151); *Taylor* v. *Adair*, 22 Iowa, 279; *Gradwohl* v. *Harris*, 29 Cal. 150; *Yuba Co.* v. *Adams*, 7 Cal. 35; *State, ex rel.*, v. *Graham*, 23 La. Ann. 402.

No attempt was made to have the county made a party, but the appellant did ask what would have accomplished the same purpose, that is, to defend in the name of the county surveyor.

The statute requires that the assessments shall be made by the county surveyor, and that the appeal bond shall be made payable to him, and that a summons shall be issued and served upon such surveyor, but it nowhere expressly authorizes him to employ attorneys, and makes no provision for their payment if so employed.

In this case it does not appear that the surveyor had employed attorneys or contemplated such action. Under these circumstances we think the attorneys employed by the county should have been permitted to defend. *Roszell* v. *Roszell*, 105 Ind. 77.

While we are satisfied that the court erred in its ruling, it appears that the appellants were not injured by such ruling. The record discloses the fact that after they were barred from appearing upon the employment of the board of commissioners of Fulton county, they did appear for Isaiah Walker, the person who made the assessment, and continued the litigation.

The court did not err in requiring the county surveyor to take the burden of the issues and to open and close the case. *Weaver* v. *Templin*, 113 Ind. 298; *Neff* v. *Reed*, 98 Ind. 341.

During the course of the trial the appellant offered in evidence the following entry in the record of the board of commissioners of Fulton county, to show the appointment of the deputy surveyor who made the assessment appealed from:

"The board now appoints Isaiah Walker as deputy surveyor for Fulton county, Indiana, in compliance with section 5952,

Revised Statutes, 11th specification, section 240 Revised Statutes of Indiana of 1881."

In connection with this offer it was proven by Walker that he made the assessment under the appointment made in this order.

The county surveyor also offered to show that he was the son of one of the land-owners assessed for the cleaning out and repairing of the Peterson and Reed ditch, who was one of the appellants from such assessment; also, that two others of such appellants were his uncles; that these facts were reported to the county auditor by such county surveyor, prior to the making of the order appointing Walker as deputy surveyor, and that this was reported to the board of commissioners, and upon such notice the order of appointment was made.

This evidence was excluded by the court, who held that "no valid grounds were shown authorizing the appointment of Walker, and that the assessments made by him were made without authority."

The view that we take of the order of the board of commissioners appointing Walker as deputy surveyor renders it unnecessary to discuss the circumstances under which parol evidence may be introduced in aid of orders made by boards of commissioners claimed to be defective.

We are satisfied that, when subjected to a collateral attack, the order made by the board of commissioners was sufficient to sustain the assessment made by such appointee.

It is not claimed that the county surveyor was, in fact, disinterested, and, therefore, competent to make the assessment, but simply that no valid grounds were shown authorizing the appointment by the board of commissioners of a deputy to act in making this assessment.

The power to appoint a deputy to act in cases wherein the regular surveyor is interested is specially delegated to the board of county commissioners. Section 5952, R. S. 1881, which is as follows: "Such surveyor may appoint depu-

ties; and whenever the services of the surveyor are required in a case where he is interested, the board of commissioners shall appoint a deputy." When they have made such appointment, the presumption exists, at least upon a collateral attack, that the county surveyor was interested in a matter wherein he was required to act, and that the board had knowledge of this fact.

It is well settled that it is not necessary to recite the grounds upon which a board of county commissioners proceeds, in a matter which is within their jurisdiction. *Platter* v. *Board, etc.*, 103 Ind. 360 (369); *Carr* v. *State, etc.*, 103 Ind. 548; *Sims* v. *Gray*, 109 Ind. 501; *Jackson* v. *State, etc.*, 104 Ind. 516 (520); *Board, etc.*, v. *Hall*, 70 Ind. 469; Dillon Mun. Corp. (4th ed.), section 318.

In the order of appointment made in this case it is recited that the appointment is made in compliance with the eleventh specification of section 240, and of section 5952, R. S. 1881, which is equivalent to saying that the appointment was made because the county surveyor was interested, on account of kinship, in some matter in which his services were required. It would, doubtless, have been better form to have specified in the order the case or matter in which the appointee was to act as such deputy surveyor, but the appointment was certainly broad enough to include the making of this assessment, and sufficient to withstand a collateral attack.

The law does not contemplate that the orders of a board of commissioners shall be drafted with much precision of statement, and if they are right in substance they will be sustained. *Bittinger* v. *Bell*, 65 Ind. 445; *Million* v. *Board, etc.*, 89 Ind. 5.

The judgment is reversed, with instruction to grant a new trial, and for further proceedings in accordance with this opinion.

Filed Feb. 6, 1892; petition for a rehearing overruled April 9, 1892.

No. 14,043.

131 221
140 307
131 221
152 678
131 221
170 216

THE EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY ET AL. v. TALBOT.

MALICIOUS PROSECUTION.—*Excessive Damages.—When Verdict will not be Disturbed.—New Trial.*—In an action for malicious prosecution which involves the question of compensation for an injury to character, a new trial will not be granted on the ground of excessive damages, unless they are so outrageous as to induce the belief that the jury acted from prejudice, partiality or corruption.

SAME.—*Witness.—Testimony of in Criminal Cause.—Admissibility of in Action for Malicious Prosecution.*—Where one of the appellants in the cause was a witness, and testified at the trial of the appellee on the charge of embezzlement, it was proper for the appellee in his action to recover damages for malicious prosecution on account of said charge of embezzlement, to prove what the testimony of said appellant was on the criminal trial.

SAME.—*Instructions to Jury.*—An instruction in an action to recover damages for an alleged malicious prosecution, which stated, among other things, that the plaintiff before he could recover must prove by a preponderance of the evidence "that the defendants, or such as are held liable, caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plaintiff," is not objectionable on the ground that it assumes some of the defendants will be held liable, when taken in connection with a subsequent instruction which informed the jury that "there can be no finding against any defendant who is not shown to have been connected with the instigation or carrying on of the prosecution."

INSTRUCTIONS TO JURY.—*Must be Considered Together.*—Instructions given to a jury must be considered as a whole. If when taken together they fairly and correctly state the law, the cause will not be reversed, even if some of the instructions, considered alone, might seem incorrect.

VERDICT.—*Weight of Evidence.*—Where there is testimony which is susceptible of an interpretation that will sustain the verdict the same will not be disturbed.

From the Warrick Circuit Court.

J. E. Iglehart and *E. Taylor*, for appellants.

G. Palmer and *D. B. Kumler*, for appellee.

MCBRIDE, J.—The appellee was prosecuted on a charge of embezzlement and acquitted.

He then commenced this suit against the appellant railroad company, and certain of its officers, charging that the prosecution was instigated by them, and that it was malicious and without probable cause.

The trial resulted in a verdict and judgment in his favor against the company and one of the officers, and in favor of the other officers sued.

The principal question argued here is the sufficiency of the evidence to sustain the verdict. The appellants contend with much earnestness that it is insufficient. As the testimony comes to us, in the bill of exceptions, if we were authorized to weigh it and to decide with the party having the preponderance, we would unhesitatingly reverse the judgment. As it thus reaches us the appellee not only has not a preponderance, but the evidence seems to preponderate strongly in favor of the appellants.

The examination of this question necessarily involved the reading of the testimony—a work of no small magnitude. As a result, we are not able to say that there is no evidence tending to sustain the verdict. No good purpose would be subserved by quoting or examining here any portion of the testimony, which covers over one thousand pages of manuscript. It is enough to say that there is testimony which is susceptible of an interpretation that will sustain the verdict. While it is also open to a different construction, in accordance with the claim of the appellants, it is evident that the jury and the trial judge decided the question of interpretation adversely to them.

One of the principal reasons for the rule of practice now so firmly established that this court will not weigh conflicting evidence is, that the jury and trial judge, hearing the testimony as it falls from the lips of the witnesses, with opportunity to observe their demeanor and manner of testifying, and having the benefit of many surrounding and attendant circumstances which can never reach this court through the medium of a bill of exceptions, are in better

situation to draw correct inferences and to construe and weigh the testimony than we are. We can not, therefore, reverse, the case on the evidence.

The appellants also insist that excessive damages were awarded. The verdict was for $6,500.

Courts seldom disturb verdicts on the ground that compensation for an injury to character has been estimated by too high a standard. In cases of this character a new trial will not be granted on the ground of excessive damages, unless they are so outrageous as to induce the belief that the jury acted from prejudice, partiality or corruption. *Guard* v. *Risk*, 11 Ind. 156; *Alexander* v. *Thomas*, 25 Ind. 268; *Crocker* v. *Hadley*, 102 Ind. 416.

An action for malicious prosecution, like actions for libel or slander, involves the question of compensation for an injury to character. We can not disturb the verdict on that ground.

The appellants asked the court to give several special instructions, which were refused. The correctness of this ruling is questioned. We find in examining the instructions given by the court, and comparing them with those refused, that in so far as those asked and refused were correct they were substantially and fairly embodied in those given.

The third instruction given by the court, on its own motion, is as follows:

"3d. Before the plaintiff will be entitled to recover anything he must prove by a preponderance of the evidence: 1st. That the plaintiff was charged with the crime of embezzlement. 2d. That he was arrested upon said charge. 3d. That he was tried and acquitted upon said charge.

"4th. That the defendants, or such as are held liable, caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plaintiff.

"5th. That such prosecution was malicious and without probable cause."

To this instruction the appellants object because, they say, it "assumes that some of the defendants will be held liable." We do not think the objection is well founded. In our opinion the instruction is unobjectionable, when it is read, as it must be, in connection with the other instructions given. By its 6th instruction the court charged the jury as follows:

"6th. Your verdict in this case, if the facts warrant it, may be against some of the defendants, and in favor of the others; but there can be no finding against any defendant who is not shown to have been connected with the instigation or carrying on of the prosecution."

Similar objection is made to the 31st and 32d instructions, which are as follows:

"31st. Though probable cause can not be inferred from malice, yet in determining whether there was or was not probable cause, the fact that there was ill-will, or malice, may be considered.

"32d. The jury may consider, as tending to support the action, delay in commencing the prosecution, after the alleged commission of the offence, and in bringing said prosecution to a trial after it was commenced."

The appellants complain that No. 31 assumes that there was ill-will, or malice on the part of the appellants against the appellee, and that No. 32 assumes: 1st. That the prosecution was, in fact, commenced by the appellants, and, 2d. That there was delay in the prosecution.

It is well settled that instructions given to a jury must be considered as a whole. If, when taken together, they fairly and correctly state the law, the cause will not be reversed, even if some of the instructions, considered alone, might seem incorrect. *Eggleston* v. *Castle*, 42 Ind. 531; *Kirland* v. *State*, 43 Ind. 146; *Brooks* v. *Allen*, 62 Ind. 401; *Nicoles* v. *Calvert*, 96 Ind. 316; *Wright* v. *Fansler*, 90 Ind. 492; *Louisville, etc., R. W. Co.* v. *Grantham*, 104 Ind. 353; *Town of Rushville* v. *Adams*, 107 Ind. 475; *Indiana, etc., R. W.*

Co. v. *Cook,* 102 Ind. 133; *Cline* v. *Lindsey,* 110 Ind. 337; *Craig* v. *Frazier,* 127 Ind. 286.

The instructions in this case, when taken together, we think fully and fairly state the law.

One of the appellants was a witness, and testified at the trial of the appellee on the charge of embezzlement. On the trial of the case at bar the appellee was allowed to call a witness to prove what the testimony of this appellant was on the criminal trial. This was not error. *Shannon* v. *Spencer,* 1 Blackf. 526.

We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 2, 1892; petition for a rehearing overruled April 19, 1892.

No. 14,831.

131	225
154	89
131	225
f166	474
166	478

THE OLD NATIONAL BANK OF EVANSVILLE *v.* FINDLEY.

REAL ESTATE.—*Conveyance.—Equitable Title.—Purchaser with Notice.—Execution Creditor.—When not bona fide Purchaser.*—A. executed a deed to B. for certain real estate on the 19th day of October, 1885. B. thereafter sold the land to C. and delivered the deed he had received from A. to C.'s agent, and the same, not having been recorded, was destroyed, and A. made a conveyance directly to C. Subsequently A. executed another deed to B., reciting as a reason for so doing the loss or destruction of the prior deed. C. afterward conveyed the land to D.

Held, that D. acquired a good title to the land as against an execution creditor whose claim rested upon a sheriff's sale made on a judgment rendered on the 26th day of February, 1886, against A. and others.

Held, also, that at the time the judgment was rendered, A. had no estate or interest in the land upon which the judgment could fasten, and that B. was the equitable owner of the land, if not the legal owner, and that against a prior equitable title a judgment can not prevail.

Held, also, that C. being a *bona fide* purchaser in all that the term implies, her grantee acquired title even if he purchased with notice.

Held, also, that an execution creditor who buys at his own sale is not a *bona fide* purchaser within the meaning of the law.

SAME.—*Statute of Frauds.—When Creditor can not Take Advantage of.*—A creditor can not take advantage of the statute of frauds to avoid a sale of lands made by the debtor, although the latter might have done so if he had elected.

SAME.—*Conveyance to Defraud Creditors.—Innocent Grantee.—Protection of.—Presumption of Good Faith.*—If a conveyance is made with intent to defraud creditors, and the grantee does not participate in the fraud, and pays a valuable consideration for the realty, his rights and the rights of his grantees are secure against such creditors. The presumption is in favor of good faith, and unless overcome makes a *prima facie* case.

SAME.—*Voluntary Return of Deed.—Title not Revested.*—The voluntary return of a deed to the grantor for the avowed purpose of cancellation does not revest the grantor with title. *Speer* v. *Speer*, 7 Ind. 178, and *Thompson* v. *Thompson*, 9 Ind. 323, distinguished.

From the Vanderburgh Circuit Court.

J. E. Iglehart and *E. Taylor*, for appellant.

J. T. Walker, for appellee.

ELLIOTT, C. J.—Both parties claim title to the land which is here the subject of controversy through John McDonald. The claim of the appellant rests upon a sheriff's sale made on a judgment rendered on the 26th day of February, 1886, against McDonald and others. The appellee claims title directly through a conveyance executed to him by Elizabeth Seifert, and she claimed through deeds executed to her by McDonald and by John Woolley. Woolley asserted title through a deed executed to him by McDonald on the 19th day of October, 1885, but which was destroyed. To supply the place of the deed executed to Woolley McDonald executed another deed on the 28th day of May, 1886, wherein it was recited that a deed was executed to McDonald on the 19th day of October, 1885, and that it had been lost or destroyed. Woolley testified that he bought the land from McDonald and received a deed, and that it was five or six months before he conveyed the land to Mrs. Seifert. He also testified that he gave her the deed executed to him by McDonald. McDonald's testimony was substantially the

same as that of Woolley upon the points stated, but he fixed the date of the deed to Woolley as the 19th day of October, 1885. McDonald further testified that when the sale was made to Mrs. Seifert the deed to Woolley had not been recorded, that the interested parties brought it to him and desired him to make a deed directly to Mrs. Seifert, and that the deed to Woolley was then destroyed.

The appellant's counsel argue with ability and earnestness that the trial court erred in allowing the appellee to prove by parol the contents of the deed executed by McDonald to Woolley in October, 1885. Their position is that as the grantors of Findley voluntarily destroyed the deed, oral evidence of its contents was not competent. But we do not find it necessary or proper to decide this question, for we regard the judgment below as so clearly right that we could not reverse, even if we should hold that the oral evidence was erroneously admitted.

If McDonald had no estate or interest in the land at the time the judgment was rendered, the appellant's purchase at the sale made by the sheriff conferred no right or title. The estate or interest a debtor has in the land is all that the lien of a judgment reaches, and where there is no actual interest or estate there is nothing to which the lien can attach. It is firmly settled, and settled on solid principle, that a judgment lien yields to prior equities, binding only the actual interest or estate of the debtor. *Shirk* v. *Thomas*, 121 Ind. 147, and cases cited; *Paxton* v. *Sterne*, 127 Ind. 289; *Ribelin* v. *Peugh*, 126 Ind. 216; *Johnson* v. *Hess*, 126 Ind. 298; *Boyd* v. *Anderson*, 102 Ind. 217.

We regard the evidence as very clearly showing that at the time the judgment was rendered McDonald had no estate or interest in the land upon which the judgment could fasten. Woolley was the equitable owner of the land, if not the legal owner, and against a prior equitable title a judgment can not prevail. *Glidewell* v. *Spaugh*, 26 Ind. 319; *Hays* v. *Reger*, 102 Ind. 524; *Foltz* v. *Wert*, 103 Ind. 404;

Wright v. *Tichenor*, 104 Ind. 185; *Wright* v. *Jones*, 105 Ind. 17; *Taylor* v. *Duesterberg*, 109 Ind. 165; *Harral* v. *Gray*, 10 Neb. 186; *Mansfield* v. *Gregory*, 8 Neb. 432.

The general rule affirmed and illustrated by many cases is that an execution creditor who buys at his own sale is not a *bona fide* purchaser within the meaning of the law. *Boos* v. *Morgan*, 130 Ind. 305; *Branch* v. *Faust*, 130 Ind. 538, and cases cited.

In this case Mrs. Seifert was a *bona fide* purchaser in all that the term implies. She acquired whatever title McDonald and Woolley could convey, and that title, even if it was no more than an equitable one, will prevail against that of the appellant. As she was a *bona fide* purchaser her grantee acquired title, even if it be true that he purchased with notice. *Trentman* v. *Eldridge*, 98 Ind. 525 (538).

A creditor can not take advantage of the statute of frauds to avoid a sale of lands made by the debtor, although the latter might have done so if he had elected. *Dixon* v. *Duke*, 85 Ind. 434; *Boyce* v. *Graham*, 91 Ind. 420; *Cool* v. *Peters, etc., Co.*, 87 Ind. 531; *Savage* v. *Lee*, 101 Ind. 514; *Wolke* v. *Fleming*, 103 Ind. 105; *Foltz* v. *Wert, supra; Bodkin* v. *Merit*, 102 Ind. 293; *Burrow* v. *Terre Haute, etc., R. R. Co.*, 107 Ind. 432.

If it should be granted that there was no written evidence of the conveyance to Woolley, the rule we have stated carries the case against the appellant, inasmuch as Woolley bought the land and paid a valuable consideration for it, thus acquiring an equitable title, if nothing more.

We can not agree with appellant's counsel that the evidence shows that McDonald conveyed the land to Woolley for the fraudulent purpose of cheating his creditors, but the concession that he did so would not entitle the appellant to a recovery, for there is no evidence that Woolley participated in his alleged fraudulent design, and without such evidence the rights of Woolley and his grantees are secure against creditors. The presumption is in favor of good

faith, and, unless overcome, such a presumption makes a *prima facie* case. *Louisville, etc., R. W. Co.* v. *Thompson*, 107 Ind. 442; *Bates* v. *Pricket*, 5 Ind. 22; *Adams* v. *Slate*, 87 Ind. 573 (575). There is no evidence sufficient in probative force to destroy the presumption, and it must stand.

The destruction of the deed executed to Woolley in October, 1885, was not done pursuant to a fraudulent design or to accomplish an illegal object. It was brought about by a mistake and without any evil intention. Nor was the deed destroyed by the grantee of Woolley, but by persons who assumed to act as her agents, and who probably exceeded their authority. The evidence upon this point comes from McDonald who said: "I think the deed that I delivered to John Woolley was at that time given back to me. I think Louis Seifert and James Henson brought the deed back. I said, 'You had better record the deed you have,' and they said, 'No, make another deed, and it will save the cost of recording one deed,' and I did, and I think they destroyed that deed right in my office." Woolley's testimony supplements that of McDonald, in that it shows that he sold the property to Mrs. Seifert and at the time, as he thinks, he gave the deed McDonald had executed to him to Henson. There is no evidence that in the slightest degree impeaches or contradicts the testimony of the witnesses named. The fair and legitimate inference from this testimony is, that Mrs. Seifert bought the land in good faith, that she and her grantor believed that the latter had title, so that there is no ground—not the slenderest—to rest an inference of bad faith upon, or to warrant a disregard of the presumption that all the parties acted honestly. To such a case the maxim, "Every presumption is made against a wrongdoer," can have no application for the obvious reason that there was no wrongdoer. There was no evil design nor any fraudulent purpose. This case differs from *Thompson* v. *Thompson*, 9 Ind. 323, in the essential particular that here the destruction of the deed could not by any possibility have benefited Mrs.

Seifert, but, on the contrary, if it had any effect at all it was against her interest, whereas in the case referred to the person who destroyed the instrument might have reaped some advantage from its destruction. What we have said of *Thompson* v. *Thompson*, *supra*, is substantially true of *Speer* v. *Speer*, 7 Ind. 178.

We should be strongly inclined to hold, if a judgment upon the point were required, that in a case such as this, where there is no evidence of wrong or of evil design, and the act could not benefit the party, the voluntary destruction of a deed does not preclude the party from giving parol evidence of its contents; but, as we have said, the case does not require a decision upon that point. We do, however, adjudge that the destruction of the deed does not preclude a recovery upon the facts. *Schaeffer* v. *Fithin*, 17 Ind. 463; *Rudolph* v. *Lane*, 57 Ind. 115; *Riggs* v. *Taylor*, 4 Wheat. 483. If the deed had not been destroyed, Woolley would have had the clear legal title, and that of his grantee would have been all the clearer and stronger, so that its destruction was hostile to her interest, but, as it is, Woolley had title, and that title, whatever it was, his grantee acquired.

The voluntary return of a deed to the grantor for the avowed purpose of cancellation does not revest the grantor with title. In *Rinker* v. *Sharp*, 5 Blackf. 185, the court said: "The cancelling a deed by which land has been conveyed by the mutual consent of the parties, or returning it by the vendee to the vendor, does not effect a reconveyance of the property." This is the sound and accepted doctrine. *Rogers* v. *Rogers*, 53 Wis. 36 (40 Am. R. 756), and cases cited; *Wallace* v. *Berdell*, 97 N. Y. 13; *Strawn* v. *Norris*, 21 Ark. 80, and cases cited.

In *Botsford* v. *Morehouse*, 4 Conn. 550, the grantee, finding himself unable to pay all of the purchase-money, returned the deed to the grantor for the purpose of revesting him with title, a creditor of the grantee levied upon the land, and it was held that the levy was effective, for the reason that the

title still resided in the grantee. Other cases assert a similar doctrine. *Raynor* v. *Wilson*, 6 Hill, 469; *Hinchcliff* v. *Hinman*, 18 Wis. 139; *Cunningham* v. *Williams*, 42 Ark. 170; *Starr* v. *Starr*, 1 Ohio, 321; *Tibeau* v. *Tibeau*, 19 Mo. 78 (59 Am. Dec. 329); *Warren* v. *Tobey*, 32 Mich. 45. If title does not revest where there is a direct purpose to revest it, much stronger the reason why it can not do so where there is no such purpose. Here there was no purpose to revest title in the grantor; on the contrary, the purpose of the parties was to vest title in Mrs. Seifert, and no other was entertained. The purpose was plain, the error, if there was error, was in executing it. There can, at all events, be no doubt that the title did not revest in McDonald, and if it did not, no matter where else it vested, the appellant's judgment is not a lien. Whatever view may be taken of the case the appeal must fail.

Judgment affirmed.

Filed April 26, 1892.

No. 15,599.

Houk et al. *v.* Walker et al.

Partnership.—*Partner's Interest.—Sale of.— Promissory Note.— Set-Off.*— Where one partner transfers all his right, title and interest in the assets of the firm, including the books and accounts of the partnership, to a continuing member of the firm, or another, and the outgoing member receives in payment of his interest the note of the purchaser, the maker of the note can not set off an account apparently due the firm from the member whose interest was transferred.

Same.—A sale by one partner to a continuing member of the firm, or to another, in the absence of any special agreement to the contrary, carries with it the actual interest of such partner. The presumption is that the account of such partner with the firm was taken into account, and his interest in the partnership increased or diminished according to the state of his account, and that such selling partner, in the absence

of a special agreement to that effect, is not liable to account to the purchaser for any sum which may be due from him to the firm, and, *prima facie*, such transfer cancels his account, in so far at least as the purchasing partner is concerned.

From the Hamilton Circuit Court.

G. Shirts and *M. Vestal*, for appellants.

T. J. Kane and *T. P. Davis*, for appellees.

OLDS, J.—On and prior to March 30th, 1888, one James K. Bush and the appellant William P. Houk were partners and equal owners of the Ledger newspaper property, in Hamilton county, and the firm was indebted to various persons in a considerable sum. On said day the appellee James E. Walker purchased the interest of Houk in the partnership. The contract of sale was reduced to writing. The contract providing "that for and in consideration of the payments and agreements hereinafter stated, the said Houk hereby assigns and transfers to said Walker all his rights, title and interest in and to the partnership property of Bush & Houk, including the Ledger newspaper property. James E. Walker assumes and agrees to pay one-half of the firm indebtedness of Bush & Houk, that is, Walker takes the place of Houk in the firm of Bush & Houk, takes the assets, claims, etc., and pays the liabilities, which said indebtedness is as follows:" Then a statement of indebtedness to various parties is set out, amounting to some $1,200, and continuing, the contract states, "To which shall be added any other firm indebtedness that Bush may acknowledge as a proper liability of said firm, the railway passes held by Houk to be surrendered to Walker. The said Houk is to have and take Chambers' Encyclopædia when it comes to said firm, and a side-bar buggy, Hare make, and said Walker is to pay Houk $1,500, as follows: 1st. Cash, $400. 2d. Notes, Scott and Davenport, $350, aside from interest, and is to execute note due in one year, with approved surety, for balance, and said Walker also assumes and agrees to pay note to Puntenney for $1,050,

and interest, and $500 on Stephenson mortgage referred to, being for unpaid purchase-money due from Houk."

At the date of the sale Walker executed his note, the one in suit, with appellee Theodore Johnson as surety, payable to Houk's order, in twelve months from date, for $400, with interest at 8 per cent. The note was not payable in bank.

It appears from the record that prior to the sale Houk had collected on claims due the firm some $600, and retained it. Appellant Houk endorsed the note sued upon to the appellant Wilson, who endorsed the same to appellee Miesse, who brought this action, making Walker, Johnson, Houk and Wilson parties defendant.

Several errors and cross-errors are assigned and discussed, but owing to the view we take of the case it only becomes necessary to pass upon one question, viz., the ruling of the court in overruling the demurrer of the appellee Miesse to the fourth paragraph of appellee Walker's answer.

This paragraph of answer seeks to plead an amount alleged to be $800 collected, received, retained and converted by Houk to his own use prior to the sale by him to Walker as a set-off against the note.

It is alleged in the answer that Bush and Houk were partners prior to March 30th, 1888, and that Houk had collected, retained and converted to his own use of the moneys of said firm $800. The answer alleges the purchase by Walker of Houk's interest in the partnership, and sets out a copy of the contract, and alleges that by such purchase Walker acquired all the rights of Houk and assumed all of his liabilities in said firm, and that the note in suit was executed for the amount due on the purchase; that at the time Walker purchased said interest of Houk he had no knowledge that Houk had collected or retained any of the moneys of said firm, or that he was indebted to said firm, and the same was not taken into account in the liabilities assumed by him.

There are further allegations relative to $100 delinquent taxes which had accrued and had become a lien on the newspa-

per property prior to the purchase of the same by Bush and Houk, and which he was compelled to and did pay to protect the property. The answer is pleaded as a defence to the whole cause of action.

It is further alleged that on discovering the indebtedness of Houk to the firm, Bush, for a valuable consideration, assigned his interest therein to said Walker, and in assurance thereof has executed a written assignment of the same. A copy of a writing signed by Bush is filed with the paragraph of answer, stating that he had heretofore assigned and transferred all his rights and interest in the claim of Bush & Houk and Bush & Walker against Houk, and that the writing is executed "in assurance" of the transfer.

The paragraph of answer is radically defective. The written contract of sale, complete in itself, shows the sale to have been a sale and transfer of the interest of Houk in the partnership property, in consideration of certain amounts to be paid by Walker. As stated in the contract, Walker took the place of Houk in the firm of Bush & Houk, and took the assets and was to pay the liability. If each member of the firm of Bush & Houk paid into the firm an equal amount, and at the time of the sale Houk had drawn out more than Bush, such excess would not constitute a debt to the firm for which the firm could have sued Houk. He only became liable to account on final settlement for the excess received. The written contract only purports to sell and transfer the interest of Houk in the firm, whatever that interest may be. If he had drawn from the firm more in proportion to his interest than his co-partner, his interest in the firm would have been diminished to that extent. By the contract Houk does not transfer to Walker any cause of action or interest in a cause of action against himself. He transferred to Walker the interest he had in the firm at that time, whatever it may have been. If there was any fraud or mutual mistake by which Houk became liable to make good to

Walker or to the firm any amount he had drawn from the firm, such facts must be pleaded showing Houk's liability.

The averments of this paragraph of answer are to the effect that Houk had collected $800 of money due the firm and had retained it, whereby he became indebted to the firm in said sum. The collection and retention of $800 of money due the firm may or may not have made him liable to account to and pay over to this firm or to his co-partner on final settlement. If the firm was solvent and his partner had drawn an equal amount from the firm, he would in no way be liable to pay over any sum whatever to the firm or his co-partner, but could retain the money so collected by him. There is no averment in the fourth paragraph of answer as to the condition of the accounts of the partners, except that Houk had collected, retained and converted to his own use $800 of the moneys of said firm. For aught that appears, Bush may have collected, retained and converted to his own use a much larger sum, and there may have yet remained an ample amount of firm assets to have paid all existing liabilities of the firm. It certainly can not be true in law, or in good conscience, when a partnership, such as the one under consideration in this case, has been running for years and the partners have been from time to time collecting and using the money of the firm, and charging the same against the partner receiving it, that upon a sale by one partner of his interest in the partnership property, including the claims due the firm, the selling partner would become liable to account to and pay the succeeding firm the amount of money he had drawn during all the time he was a partner, even though the condition of his account with the firm was not known to the purchaser. It is the duty of the purchaser to ascertain the status of the accounts.

In many instances, if the business had been conducted for a number of years, the amount drawn by the partner prior to the sale would amount to a larger sum than the value of the partnership property.

We regard it as a well-settled rule that a sale by one partner to a continuing member of the firm, or to another, in the absence of any special agreement to the contrary, carries with it the actual interest of such partner; that the presumption is, that the account of such partner with the firm was taken into account and his interest in the partnership increased or diminished according to the state of his account, and that such selling partner, in the absence of a special agreement to that effect, is not liable to account to the purchaser for any sum which may be due from him to the firm, and *prima facie* such transfer cancels his account, in so far at least as the purchasing partner is concerned. See *Thompson* v. *Lowe*, 111 Ind. 272 (275), where the question is fully discussed.

The court erred in overruling the demurrer to the fourth paragraph of appellee Walker's answer.

The case was tried upon a wrong theory, the court having held that the appellee Walker's answer of set-off was good. Houk then made application and asked to have the note allowed as exempt, also the money collected by him while a member of the firm of Bush & Houk allowed as a set-off. These applications were denied. These applications for exemption, and the rulings thereon, grew out of the erroneous ruling on the demurrer to the fourth paragraph of answer, and will probably not arise on a retrial.

In our opinion justice will be best subserved by setting aside the judgment as to all the parties, with directions to sustain the demurrer to the fourth paragraph of the answer of appellee Walker.

Judgment is reversed, at costs of appellee Walker, with instructions to set aside the judgment as to all of the parties, and to sustain the demurrer to the fourth paragraph of the answer of appellee Walker.

Filed April 20, 1892.

No. 15,718.

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Butler et al. v. Thornburg.

PRACTICE.—*Sustaining Demurrer.—Harmless Error.*—Where a demurrer was sustained to a paragraph of answer, and all the evidence that could have been given to support said paragraph was admissible under other paragraphs, the error, if such it was, in sustaining the demurrer, is not an available error on appeal.

MORTGAGE.—*Money Advanced to Pay Off Liens.—Failure of Wife to Join in Mortgage.—Rights of Wife.—Section 2495, R. S. 1881, construed.*—The defendant, in common with several others, owned a tract of land. He and his wife executed mortgages on his undivided interest to the plaintiff to secure the indebtedness of the husband for an amount in excess of his said interest. The entire tract was heavily encumbered. The defendant acquired the interest of the others, upon the understanding that he was to assume and pay off the mortgages. The plaintiff agreed to furnish a sufficient amount of money to pay off and discharge all of said liens except those owned by himself. He did so, and the defendant executed a mortgage to the plaintiff on the entire tract for the money so paid by the plaintiff and for the amount of his own mortgages. The defendant's wife refused to join in this mortgage.

Held, that the mortgage executed to the plaintiff by the defendant represented the whole of the consideration paid by the defendant for the conveyance of the property to him, and that the plaintiff was as much entitled to the protection of section 2495, R S. 1881, which declares that although a wife do not join in a mortgage, given to secure the whole or any part of the purchase-money, she is not entitled to any interest as against the mortgagee, as he would have been if he himself had been the vendor.

Held, also, that the mortgage, in so far as it represented the money paid as purchase-money, was superior to any interest of the wife, but not as to the amount paid in extinguishing the mortgages executed by the husband upon his own interest.

From the Henry Circuit Court.

M. E. Forkner, *C. S. Hernley* and *S. H. Brown*, for appellant.

J. M. Brown and *W. A. Brown*, for appellee.

MILLER, J.—This was an action to foreclose a mortgage, brought by the appellee against Rollin T. Butler and Martha Butler.

The defendant Martha Butler filed an answer in several paragraphs, to some of which demurrers were sustained. The plaintiff replied to the remaining paragraphs, and the issues thus joined were submitted to the court for trial, who, at the request of parties, returned a special finding of facts and conclusions of law.

Several errors are assigned, but only two have been discussed by the appellants' counsel in their brief, viz.: That the court erred in sustaining the demurrer to the fourth paragraph of answer; and that the court erred in its conclusions of law from the facts found.

We find, upon examination, that all the evidence that could have been given to support the fourth paragraph of answer was admissible under other paragraphs, and the error, if such it was, in sustaining the demurrer to this paragraph, did not injure the appellant. *Rush* v. *Thompson*, 112 Ind. 158; *Landwerlen* v. *Wheeler*, 106 Ind. 523; *Ralston* v. *Moore*, 105 Ind. 243; *Messick* v. *Midland R. W. Co.*, 128 Ind. 81.

A synopsis of the facts found by the court, so far as they are necessary to present the questions of law discussed by counsel, is as follows: The land described in the complaint was owned by said Rollin T. Butler, Barton L. Butler and their mother, Diza Butler, and was encumbered for an amount largely in excess of its value; that the defendant Martha Butler had joined with her husband in the execution of a part of the mortgages resting on the land, for his indebtedness, for an amount in excess of his interest therein; that the plaintiff Thornburg was one of the mortgagees. In February, 1888, Rollin T. Butler purchased of his mother and brother all their interest in the land, in consideration that he would pay and discharge all the mortgage liens thereon. Rollin T. made an agreement with the holders of the mortgages to pay them a certain per cent. of their claims, which they were to receive as full payment. It was agreed between Rollin T. and the plaintiff that plaintiff should furnish a sufficient amount of money to pay off and discharge all said

liens, except those owned and held by himself, and that Rollin would, upon the execution of a deed to him, and the payment of said liens by the plaintiff, execute to the plaintiff a mortgage, his wife joining in its execution, for the money so paid by plaintiff in discharge of the liens, and for the full amount of the liens held by plaintiff, amounting in all to the sum of $8,320. On the 20th day of February, 1888, the plaintiff, said Rollin T., Barton L. and Diza Butler, and the lien-holders, met for the purpose of executing said contracts, and being so met, said Diza and Barton executed a deed to Rollin for said lands, and the plaintiff furnished the money necessary to pay off all said liens, and did pay off and caused them to be released and discharged of record; that thereupon Rollin T. Butler executed the mortgage in suit to the plaintiff for said sum of $8,320; that the defendant, Martha Butler, refused to join in the execution of the mortgage.

From these facts the court held as a conclusion of law that the mortgage was a valid lien on the land, and that said Martha Butler had no interest, inchoate or otherwise, superior to the lien of the mortgage.

It is provided by statute (section 2495, R. S. 1881,) that "Where a husband shall purchase lands during marriage, and shall, at the time of purchase, mortgage said lands to secure the whole or part of the consideration therefor, his widow, though she may not have united in said mortgage, shall not be entitled to her third of such lands as against the mortgagee or persons claiming under him."

The mortgage executed to the appellee represented the whole of the consideration paid by Rollin T. for the conveyance of the property to him, and we are satisfied that he is as much entitled to the protection of the statute above cited as he would have been if he had himself been the vendor.

There is nothing in the statute to indicate that the Legislature intended that the mortgage to secure the purchase-money should necessarily be given to the vendor.

In *Jones* v. *Parker*, 51 Wis. 218, the court, in a case much

like the one before us, speaking of a provision of the statute of that State, substantially like our own, says: "Neither would the wife have had any right of dower as against the mortgage, because it was for purchase-money."

In *Clark* v. *Munroe*, 14 Mass. 351, land was conveyed to a husband, and at the same time mortgaged to a third person who furnished the purchase-money. It was held that the widow of the grantee had no right of dower as against the mortgagee. See, also, *Kaiser* v. *Lembeck*, 55 Iowa, 244.

The decisions of this, and other courts, giving persons who have furnished money for the express purpose of purchasing real estate, the same lien given vendors, strongly sustain this construction of the statute. *Dwenger* v. *Branigan*, 95 Ind. 221; *Barrett* v. *Lewis*, 106 Ind. 120; *Carey* v. *Boyle*, 53 Wis. 574; *Charter Oak, etc., Ins. Co.* v. *Stephens* (Utah), 16 Pac. Rep. 253.

In so far as the mortgage sued on represents the money paid by the appellee, as purchase-money, it is superior to any interest, or claim of title, by the appellant.

If the husband of the appellant had, prior to his purchase from his mother and brother, owned no portion of the land, and had thereby acquired the whole title, then the mortgage would have represented purchase-money only, and the appellant would, as against this mortgage executed by her husband, have had no claim to the land, or any part of it.

But it appears from the finding that prior to this purchase, her husband owned some portion, presumably one-third of the property. This interest he did not, of course, acquire by this purchase, and the amount paid in extinguishment of the mortgages executed by Rollin T. and the appellant, upon his own land, was not purchase money; and the mortgage, in so far as it represents this amount, was not a purchase-money morgage, the foreclosure of which would cut off her inchoate interest.

It is found that the interest of her husband in the land had been mortgaged, she joining in the execution of the

mortgages, for an amount largely in excess of its value, and if joined with the foreclosure, a paragraph of complaint had been added, asking that the plaintiff be subrogated to the rights of the mortgagees whose claims had been paid by him, another question would be presented.

The conclusion of law that the appellant had no interest in the land, as against the mortgage, was not warranted by the facts found, and the judgment must, therefore, be reversed.

We are satisfied that the ends of justice will best be subserved by granting a new trial. Section 660, R. S. 1881; *Murdock* v. *Cox*, 118 Ind. 266; *Sinker, Davis & Co.* v. *Green*, 113 Ind. 264.

The judgment is reversed, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

Filed April 9, 1892.

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171 600

No. 15,568.

The Louisville, Evansville and St. Louis Consolidated Railroad Company *v.* Summers, Administrator.

Pleading.—*Complaint.—Contributory Negligence.—Sufficiency of Averment as to.*—In an action to recover damages for personal injuries resulting in death, an averment in the complaint that the decedent was free from contributory negligence is sufficient, unless facts specially pleaded clearly show that he was guilty of contributory negligence.

Verdict.—*General.—Special Finding.*—If the special findings can, upon any reasonable hypothesis, be reconciled with the general verdict, the latter will control. The court is bound to make every reasonable presumption in favor of the general verdict, which, of necessity, involves a finding upon every material question in issue. The court can not pre-

sume anything in aid of the special findings, but is limited, so far as they are concerned, to the specific facts actually found.

NEW TRIAL.—*Motion for.—When Filed too Late.*—Where a case was tried at the May term, 1889, and the verdict was returned June 7th, 1889, the court adjourning for the term on June 8th, and the next term convened September 2d, 1889, a motion for a new trial filed on October 4th, 1889, was not filed in season. See section 561, R. S. 1881.

PRACTICE.—*Substitution of Defendant.—Railroad.—Consolidation of Companies.*—Where, in an action to recover damages for personal injuries against a railroad company, it was shown to the court by verified petition that after the commencement of the suit the then defendant corporation, with certain other railroad corporations, had merged and consolidated their respective rights and franchises, and had thereby formed a new and consolidated corporation, which had succeeded to all the rights and assumed all of the liabilities of all the original corporations, including the liability for the appellee's cause of action, it was proper for the court to permit the substitution of said new and consolidated corporation in place of the original defendant.

From the Harrison Circuit Court.

N. R. Peckinpaugh, J. H. Weathers and *H. C. Hays*, for appellant.

R. J. Tracewell, M. W. Funk and *C. L. Jewett*, for appellee.

McBRIDE, J.—The appellee, as administrator of the estate of David Underwood, deceased, brought this action to recover damages for the death of his intestate, who was a track-walker and watchman, employed by the original defendant, the Louisville, Evansville and St. Louis Railroad Company, and who was killed while in the discharge of his duty.

Four questions are discussed:

1. The sufficiency of the amended complaint.

2. Overruling appellant's motion for a judgment *non obstante.*

3. Overruling appellant's motion for a new trial.

4. The substitution of the appellant as defendant, by order of the court, after the return of the verdict.

Counsel, in their argument, only question the sufficiency

of the complaint in one particular. They insist that it does not show that the decedent was free from contributory negligence. In their discussion of this question they have undoubtedly had in mind certain facts disclosed by the evidence, but which do not appear in the averments of the complaint.

The complaint contains the general averment that the decedent was "without fault or negligence."

This is sufficient, unless facts specially pleaded clearly show that he was guilty of contributory negligence. *Ohio, etc., R. W. Co.* v. *Walker*, 113 Ind. 196; *Pennsylvania Co.* v. *McCormack, post*, p. 250. No fact specially pleaded tends in any degree to show negligence on the part of the decedent.

Did the court err in overruling the appellant's motion for a judgment in its favor on the special findings of the jury, notwithstanding the general verdict?

Such a motion can only be sustained where there is irreconcilable conflict between them. If the special findings can, upon any reasonable hypothesis, be reconciled with the general verdict, the latter will control. See *Shoner* v. *Pennsylvania Co.*, 130 Ind. 170, where the authorities are cited. This is the rule where the special findings and general verdict can be reconciled with each other under any supposable state of facts provable under the issues, without reference to the evidence actually adduced on the trial. The court is bound to make every reasonable presumption in favor of the general verdict which, of necessity, involves a finding upon every material question in issue. The court can not presume anything in aid of the special findings, but is limited, so far as they are concerned, to the specific facts actually found.

It is entirely unnecessary to quote the special findings, or to consider them in detail. Measured by the foregoing rule, they fall far short of that which would justify disregarding the general verdict.

The circuit court did not err in overruling the motion.

The questions which the appellant seeks to present by the motion for a new trial can not be considered. The case was tried at the May term, 1889, of the Harrison Circuit Court. The verdict was returned June 7th, 1889. The court adjourned for the term June 8th, 1889. The next term of that court convened September 2d, 1889. The motion for a new trial was not filed until October 4th, 1889. The appellee at the time objected to the court permitting it to be filed, because too late, and still urges the objection.

"The application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then on the first day of the next term of such court, whether general, special, or adjourned." Section 561, R. S. 1881.

The court erred in permitting the motion to be filed when it was filed. It has no legitimate place in the record, and we can not consider it.

The only remaining question is on the action of the court in permitting the substitution of the appellant before rendering judgment on the verdict, and in then rendering judgment against it.

It was shown to the court by verified petition that, after the commencement of the suit, the then defendant corporation, with certain other railroad corporations, had merged and consolidated their respective rights and franchises, and had thereby formed a new and consolidated corporation, which by such merger and consolidation had succeeded to all the rights, and assumed all of the liabilities of all the original corporations, including the liability for the appellee's cause of action then in litigation, and that the appellant was such consolidated corporation.

While objection was made to the substitution, the fact of such consolidation was not controverted.

The court did not err in ordering the substitution and in

rendering judgment against the appellant. *Indianapolis, etc., R. R. Co.* v. *Jones*, 29 Ind. 465; *Paine* v. *Lake Erie, etc, R. R. Co.*, 31 Ind. 283; *Jeffersonville, etc., R. R. Co.* v. *Hendricks*, 41 Ind. 48 (59).

Judgment affirmed.

Filed April 9, 1892.

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131 245
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No. 15,063.

WILSON v. BURGETT, ADMINISTRATOR.

VENDOR AND VENDEE.—*Assumption of Mortgage.—Subrogation.—Injunction.—Lien.—Decedents' Estates.*—Defendant's father conveyed to him part of a tract of land. The consideration for the conveyance was the assumption of and the agreement on the part of the defendant to pay certain mortgages on the whole tract. The balance of the tract went to the defendant's mother by will. The defendant failed to pay off the mortgages, and agreed with his mother if she would do so, by the execution of a new mortgage on her portion of the tract, that he would pay off the mortgage so to be executed by her. The mother fulfilled her part of the agreement and then died.

Held, that the claim of her estate against the defendant was one for purchase-money of his land, the mother having the right to be subrogated to the same rights as her husband would have had if he had paid the debt and that her administrator might maintain a suit to have it declared a lien on the defendant's land though the mortgage defendant agreed to pay was not yet due, and to enjoin the defendant from selling or encumbering said land, it being shown in the complaint that he had no other means with which to pay off said mortgage.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

T. H. Palmer and *W. F. Palmer*, for appellee.

OLDS, J.—Dudley W. Wilson owned eighty acres of land situated in Clinton county. On the 19th day of June, 1884, said Dudley W. Wilson and Mahala Wilson, his wife, conveyed by warranty deed thirty acres off the west end of

said eighty to their son, William T. Wilson, the consideration for such conveyance, as stated in the deed, was, that on account of the age and infirmity of his father, William had, out of his own funds, paid the taxes for many years past on the eighty-acre tract, also the interest that had yearly accrued on a school fund mortgage of four hundred and thirty-seven and $\frac{50}{100}$ dollars on said real estate since the loan was created, and the further consideration that he would now fully assume the payment of said loan of $437.50, together with all interest accruing thereon, until the same was paid, and would keep the taxes paid on the eighty acres until he fully satisfied said mortgage.

Instead of there being one school fund mortgage on said land, there were four school fund mortgages on separate parcels of said land, but upon the 80 acres, including the 50 acres not conveyed, the four mortgages amounted to the total of $445.50, and they are alleged in the complaint to be the mortgage debt referred to in the deed, and the only mortgages on said land; that Dudley W. Wilson, after the execution of the deed, made a will devising the remaining 50 acres to his wife, Mahala Wilson, and Dudley W. died in 1885; that, after his death, the mortgages being due and wholly unpaid, to get further time William agreed with his mother that, if she would pay the mortgages by the execution of a new mortgage for the aggregate amount of the four mortgages on the 50 acres of the land devised to and then owned by her, he would pay the mortgage so to be executed by her. The mother, Mahala, did execute a new mortgage for the aggregate amount of the other four mortgages, and they were satisfied. Afterwards, in 1886, Mahala died, and the appellee was duly appointed administrator of her estate, and he filed his complaint in this case, alleging the foregoing facts, and further alleging that said William T. had no means other than the 30 acres of land except his distributive share or portion of the 50 acres inherited from his mother, which would not exceed $100, and that he feared

and there was danger of William T. selling or encumbering the 30 acres, whereby it would be divested from the lien which was chargeable against it for the purchase-money, and that the estate would be compelled to pay the mortgage, and would be deprived of its security and lien on the 30 acres for the payment.

There was a prayer to have a lien declared, and that appellant be enjoined from selling without having paid the mortgage, etc.

To this complaint appellant filed a demurrer for want of facts, which was overruled, and exceptions were reserved. Judgment on demurrer for the appellee, and the ruling on the demurrer is assigned as error.

The facts alleged show that Dudley W. Wilson conveyed to William T. Wilson thirty acres of land. As a consideration for the same, William was to pay off a mortgage encumbrance upon fifty acres of land to which Dudley retained the title. Mahala Wilson, wife of Dudley, took the title to the fifty acres by the will of Dudley. William failed to pay the mortgage debt; it being a lien upon the fifty acres owned by Mahala, she paid it. True, it is alleged she paid it with the agreement on the part of William that he would pay off the mortgage so executed by her. But this was a parol agreement. Mahala dies, and the appellee is appointed administrator of her estate. The evidence that the mortgage upon the land was given in payment of the debt of William, and that the estate has the right to be subrogated to the lien which the deceased Mahala had paid in her lifetime, and to have a lien declared, all rests in parol, and the appellee brings this suit, and alleges the facts in the complaint. The consideration which William agreed with his father to pay for the thirty acres was the mortgages which Mahala paid. If the father, Dudley Wilson, had lived, and William had failed to pay the mortgages, as he had agreed to do, and Dudley had paid them, it would have been a failure on the part of William to have paid the purchase-money, and cer-

tainly Dudley would have had the right to have sued William and had a vendor's lien declared upon the thirty acres.. If Dudley, by his last will, devised the fifty acres upon which the mortgages were liens, to his widow Mahala, and William failed to pay the mortgages as he had contracted, and they were liens upon the lands of Mahala, and she pays them, certainly she has the right to be subrogated to the same rights her husband, Dudley, would have had if he had paid them. The appellee, representing her estate, had the right to enforce the remedy, and we think had the right to have an adjudication upon the facts, and a lien declared, although the mortgage debt executed by his decedent was not yet due, and notwithstanding the appellant had agreed to pay it when it became due. The son agreed, as a consideration for the land, to pay the mortgages. In failing to do so, he failed to pay the purchase-money which he had agreed with his father to pay, and if the father had been compelled to pay the same to protect his own land, the son would have become indebted to the father for the amount of the purchase-money, and the father in such event would have had the right to have a vendor's lien declared on the land sold to the son. The mother having become the owner of the land by devise from her husband, the son failing to pay the mortgages, she had the right to pay the debt to preserve her own land from sale under the mortgage, and she, under the circumstances, would have the right to be subrogated to the same rights as her husband would have had if he had paid the debt.

The son having agreed to pay the mortgage executed by the mother in payment of the mortgages which he agreed to pay, the question remains whether she had the right to have her lien declared in advance of its enforcement before the last mortgage matured and a failure to pay. In other words, it presents the question whether a vendor can maintain an action to have a vendor's lien established independent of an action to enforce its collection, and we think in a proper case this may be done. See 2 Story Eq. (13th ed.), sections 694,

701, 711, 730, 825, 826, 850, 851 and 912, treating of *bills quia timet*, at section 826: "They are in the nature of writs of prevention, to accomplish the end of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent upon circumstances."

It is by reason of this doctrine that courts of equity appoint receivers, order money paid into court, direct security to be given, money paid over, issue injunctions, and grant many other remedies.

We think clearly it is within the province of a court of equity to establish a vendor's lien in advance of enforcement or of its maturity, in order to prevent probable or anticipated mischief. The party seeks the aid of the court because he fears a future probable injury.

In the case at bar the appellant has no means to pay the debt when it matures, except the thirty acres of land which it is asked a lien be declared upon until a lien is established. There is danger of the property being disposed of and innocent parties obtaining a lien which would be paramount to the right of the appellee to have a lien declared. There exists a right to have a lien declared by a court of equity, but if the lien can not be established until the mortgage matures and is paid, so that the appellant can enforce payment in connection with the establishment of the lien, rights of innocent parties may intervene which will deprive the appellee of any benefit from a vendor's lien. Akin to this doctrine was the right, in equity, of a surety to maintain an action to compel the principal to pay the debt in advance of the same having been paid by the surety, or even having been called upon for the payment, though this right may not

exist in this State since the statute authorizing the surety to give notice to the creditor and compel him to bring suit. Brandt Sure. & Guar. sections 192 and 193; *Flight* v. *Cook*, 2 Ves. 619; Maddock Ch., star pp. 178 and 9; 2 Dart Law of Vend. & Pur. (6th ed.), p. 1248.

There was no error in overruling the demurrer to the complaint.

Judgment affirmed, with costs.

Filed May 26, 1891; petition for a rehearing overruled April 9, 1892.

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No. 14,973.

The Pennsylvania Company v. McCormack, Administrator.

Railroad.—*Complaint.—Contributory Negligence.—Demurrer.—Motion to Make More Specific.*—In an action to recover damages for personal injuries resulting in death, a general averment in the complaint that the party was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. Such an averment is sufficient to withstand a demurrer or a motion to make more specific.

Same.—*Construction of Track.—Duty as to.—Co-Employee.*—If a railroad company so negligently constructs its tracks and side tracks, that cars occupying the main line of its track can not pass cars occupying the adjacent side track without endangering the lives of the employees charged with the duty of moving such cars, its negligence is actionable. If one of its employees is, by reason thereof, killed or injured while in the discharge of his duty, and is himself without fault, and using due care, such company is liable to respond in damages. It was the duty of the company to contemplate that sooner or later cars might have to pass each other at each and every point on the two tracks. It is no defence that those whose acts brought such cars into such dangerous proximity were co-employees with the one injured.

Same.—*Negligence.—Proof of Custom.*—It was proper for the plaintiff to show that it was customary to cut moving trains at the station when the decedent was killed. As bearing on the question of negligence and

tending in some degree to show whether or not the decedent was negligent, it was competent to prove that he was or was not doing his work in the usual and customary way.

SAME.—*Instructions to Jury.—Prefatory Statement.—Contributory Negligence.*—An instruction to the jury which fairly and tersely states all of the material facts necessary to be established by the plaintiff to entitle him to recover is not objectionable on the ground that the jury might fail to make the necessary connection between the prefatory statement, "If you shall find from the evidence," and the propositions that follow. The defendant can not complain of a clause in said instruction which informed the jury that to entitle the plaintiff to recover the intestate must have been "without any fault or negligence on his part."

INSTRUCTIONS TO JURY.—*When Court Should not Direct Verdict.*—Where there is evidence tending to support the plaintiff on all material questions, it is proper for the court to refuse to instruct the jury to return a verdict in favor of the defendant.

SAME.—*Correctness of.—See Opinion.*—For correctness of instructions on some of the more material points involved in the case, see latter part of opinion.

VERDICT.—*When will not be Disturbed.*—Where there is evidence tending to sustain the verdict on all material points, it will not be disturbed.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

F. T. Hord, *M. D. Ewing*, *G. W. Cooper* and *C. B. Cooper*, for appellee.

MCBRIDE, J.—William Riley was a brakeman, employed by the Pennsylvania Company. He was killed at Middle Creek Station, Jefferson county, and the appellee, as administrator of his estate, brought this suit to recover damages for his death.

The material averments of the complaint are as follows, omitting those merely prefatory or technical:

"At said station there is a switch used by defendant for switching trains and for storing and depositing freight cars, when necessary for the company, in the course of its business, to leave cars at such station. He avers that at the date hereinafter mentioned there was a box freight car standing on said switch, previously left by the officers and agents of defendant for the purposes of defendant.

Plaintiff avers that on or about the 28th day of July, 1888, William Riley was a servant in the employment of defendant as brakeman on a freight train run and operated by defendant over said line from Madison via Middle Creek Station to Columbus, Indiana. In making said trip, it became necessary to leave a car, which was a part of said freight train, at said Middle Fork Station, and to deposit said car on said switch.

He avers that a ladder is constructed on the side of said freight cars, to be used by brakemen in ascending and descending from the cars, and in coupling and uncoupling cars, and to ride on the same to open and close switches, and to give signals to his fellow-servants in the management of said train. And plaintiff avers that the said Riley, while acting as brakeman as aforesaid, and in the line and performance of his duty, while standing and riding on said ladder and giving directions, by motioning and signalling with his hand to the brakeman at the rear end of the train, to hold it until the switching could be performed at Middle Creek Station, and to enable him to open and close the switches when required, and while so standing, and in the performance of his duty, on the car on the main track of said defendant, which was in motion, the person of said Riley, without any fault or negligence on his part, came in collision with the end of said freight car standing on said switch at said Middle Creek Station, and he was then and there and thereby knocked from said ladder and car on the main track, on which he was standing, to the ground, and then and there and thereby killed.

Plaintiff avers that the death of said Riley was caused by the carelessness and negligence of defendant in maintaining its switch at said station too near the main track of said defendant, whereby sufficient space and distance could not be maintained between cars running on the main track and those standing on the switch to enable the servants of defendant to perform their duty with reasonable safety, and

the switch of defendant was carelessly and negligently allowed to get and remain out of repair, and the deceased was thereby injured.

He avers that at the point where said Riley was killed the siding of said switch was but six feet and eight inches from the main track; the switch was constructed and maintained with the ties on the surface of the ground, with no ballast of sand, gravel or other material; the switch at said point was on a straight line, and not a curve, and the track of the switch should have been made level, or the siding next to the main track should have been raised so as to cause the cars to lean therefrom, but he avers that on account of the negligence of defendant the rail of the switch next to the main track was suffered and permitted by defendant to be and remain three inches lower than the opposite rail of the switch, thereby causing the said freight car standing on said switch to lean towards the main track. The freight cars on the main track and the car on the switch protruded some distance over the line of their several tracks, and reasonably sufficient space did not exist and could not be maintained between the cars passing on the main track and freight cars standing on said switch for the safe performance of duty by deceased at the point where he was killed, the space between said points being, to wit, about two feet.

He avers that deceased was never informed of the danger of said place or of the condition of said switch, and his back was to the place of danger at the time he was injured, giving signals to his co-employees, and in position to open the switch at said point as required in the performance of his duty, and he had no knowledge of the dangerous and improper condition of said tracks and switches.

He avers that the deceased was an inhabitant of Bartholomew county, and was twenty-seven years of age, and he left a wife, Fanny Riley, and a child one year of age, Charles Maurice Riley, who were dependent on deceased for support."

Counsel for the appellant filed a motion to require the appellee to make his complaint more specific, indicating sixteen particulars in which it was, according to his views, lacking in certainty and in sufficiency of averment.

The motion is long, and, the complaint being set out above, it is unnecessary to extend the limits of this opinion by copying the motion.

A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a good cause of action, was also overruled.

We will only say of the motion and of the demurrer that by the motion and the argument in support of it, the appellant insists that additional and specific averments should be added, showing that the deceased was free from contributory negligence, showing *why* he was, when killed, acting in the line of his duty; that he show by specific averments *all* of the facts connected with the transaction, with reasons showing why each act alleged to have been done by the decedent was within the line of his duty, and not negligent, and why each act of omission or commission charged against the appellant was negligent.

All of the precedents in this State sustain as sufficient the general averment that the party was without fault, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. Among the cases are *Ohio, etc., R. W. Co.* v. *Walker*, 113 Ind. 196, and many others there cited.

The code prescribes that the complaint shall contain "A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Section 338, R. S. 1881, clause 2.

Good pleading does not require, nor will it justify adding to the statement of the material facts a statement of reasons or arguments to vindicate the pleader's opinion that the facts stated are sufficient to authorize a recovery. The facts stated

also should be the material and ultimate facts, and not mere evidentiary facts.

The complaint might with more justice be criticised as containing unnecessary or redundant averments. It is averred, in substance, that the death of the decedent was caused by appellant's negligence in constructing and maintaining its switch too near its main track, not allowing sufficient space between for cars to pass each other, so as to enable its employees to perform their duties with reasonable safety; that the space between them was only six feet eight inches; that the rail on the inner side of the side-track, next to the main track, was three inches lower than its outer rail, the effect of which was to cause the cars thereon to lean toward the main track, and that this, with the distance which the cars on each track "protruded" beyond the lines of the tracks, did not allow sufficient space for the safe performance of duty by the deceased.

Coupled with the averments showing these facts are others, apparently irrelevant, and, so far as we can see, having no necessary connection with them. They might have been stricken out on motion, but the court did not err in refusing to require the appellee to make them more specific. The material averments are sufficiently specific and certain.

Counsel for the appellant argues that to constitute actionable negligence the injury must be the "usual and, therefore, to be expected result of the negligence complained of;" that the appellant was not required to anticipate the contingency of a car being placed on the side-track, and the work being done as it was done, and that such a result as the killing of the appellee in that way was something they could not be required to guard against and for which they should not be held responsible. It is conceded that if a permanent obstruction had been placed thus near the track the company would have been liable.

It is also urged that the proximate cause of the appellee's death was the placing of the car on the side-track at that

point, and that this being the act of a co-employee the company is not liable.

Neither of these objections to the complaint is tenable.

While the *immediate* cause of the decedent's death was the car, the real cause was the manner in which the side-track was constructed.

We must know that railroad tracks, both the main and side-tracks, are constructed to be used in the transport of cars from point to point, and that at times cars must necessarily be allowed to stand on such tracks, and while thus standing may properly be passed by other cars on adjacent tracks.

We must also take notice of the fact that certain of the employees, serving railroad companies, are charged with the duties incident to the moving of such cars.

The obligation of the master to the servant forbids that he should, by negligence, subject the servant to risks greater than those which fairly and properly belong to his employment.

If a railroad company so negligently constructs its tracks, and side-tracks, that cars occupying the main line of its track can not pass cars occupying the adjacent side-track without endangering the lives of the employees charged with the duty of moving such cars, its negligence is actionable. If one of its employees is, by reason thereof, killed or injured while in the discharge of his duty, and is himself without fault, and exercising due care, such company is liable to respond in damages. It is no defence that those whose acts brought such cars into such dangerous proximity were co-employees with the one injured. Properly constructed, the tracks would allow the cars to pass without danger, and the master is responsible for the manner of their construction. It will not do to say that the company was not required to contemplate such a contingency when it constructed the tracks. They were constructed to be used, and to be used in that manner, and it was its duty to contemplate the possibility

that sooner or later cars might have to pass each other at each and every point on the two tracks.

Other objections are also urged to the complaint, but we think none of them are well taken. In our opinion the court did not err in its rulings either on the motion or on the demurrer.

On the trial of the case, over the objection of the appellant, the appellee was permitted to prove that it was customary to cut moving trains at the station where the decedent was killed. It is argued that this was error. We might well decline to consider the question, on the ground that the objection, as shown by the record, was insufficient to present the question argued. We think, however, that the court did not err in this ruling. True, a custom would not justify a negligent act, but, as bearing on the question of negligence, and tending in some degree to show whether or not the decedent was negligent, it was competent to prove that he was or was not doing his work in the usual and customary way, which of course involves the inquiry, what was usual and customary?

The action of the court in giving, refusing and modifying a large number of instructions is challenged by the motion for a new trial, but most of the questions thus suggested are waived by a failure to argue them.

The appellant, by its first special instruction, asked the court to direct a verdict in its favor.

There being evidence tending to support the appellee on all material questions, the court rightly refused this instruction. If there is any conflicting evidence, however slight, upon the point in issue, it must be left to the jury. *Adams* v. *Kennedy*, 90 Ind. 318; *Boling* v. *Howell*, 93 Ind. 329; *Lawrenceburgh, etc., R. R. Co.* v. *Montgomery*, 7 Ind. 474; *Haynes* v. *Thomas*, 7 Ind. 38; *Crookshank* v. *Kellogg*, 8 Blackf. 256; *Babcock* v. *Doe*, 8 Ind. 110; *Messick* v. *Midland R. W. Co.*, 128 Ind. 81.

The fifth instruction given by the court consists of a recital of the material facts asserted by the appellee, and which he was required to establish by evidence to justify a recovery, coupled with prefatory and concluding statements instructing the jury that if they should find said facts from the evidence the appellant was liable for the killing of the decedent.

The instruction is long, and we think it unnecessary to lengthen this opinion by bringing it into the record. Several objections are urged to it. It is insisted that it is misleading, and is "fatally defective for lack of essential elements for a recovery."

It is urged that it is misleading because it would be difficult for the common mind to bear in mind and apply to each proposition the prefatory statement, "If you shall find from the evidence," and that there was therefore danger that the jury, failing to make the necessary connection, might regard some of the expressions used as expressions of the opinion of the court. We have read and considered the instruction carefully, and are of opinion that this objection is not well taken.

The jury were informed that if they found certain facts the plaintiff was entitled to recover. It certainly imposed no very severe task upon the average intellect to apply to each consecutive fact stated, and following immediately after it, the prefatory statement. Such an instruction, if it embraces and fairly and tersely states all of the material facts necessary to be established by the plaintiff is not improper. The appellant complains that the portion of this instruction relating to contributory negligence is "vague and indefinite," and should have been much more full, indicating several particulars in which they contend it is lacking in this respect. The jury were informed by the court that the intestate must have been "without any fault or negligence on his part." This was more favorable to the appellant than it could ask, as it would preclude a recovery if the decedent had been

guilty of any negligence whatever, whether it contributed to his death or not. Elsewhere, however, full and correct instructions were given on the subject of contributory negligence, but as a portion of an instruction like that in question, placing before the jury in a connected and consecutive form the material facts which the appellee must establish to justify a recovery, this portion of the instruction was probably sufficient. At all events the appellant could not complain of it. We do not think the court erred in giving this instruction.

The only remaining instructions discussed are the sixth, seventh, eighth, and eighteenth, and are as follows:

"6. When Riley sought employment at the hands of defendant, he was held to an implied representation that he was competent to perform the duties of the position he sought, and competent to apprehend and avoid all danger that might be discovered by the exercise of ordinary care and prudence, and for the purposes of this case Riley is to be treated as a brakeman and switchman of ordinary experience and skill.

"7. A railroad company is required to use ordinary care in constructing and maintaining its roadway, switches, and appliances in such a manner and condition that its servant can do and perform all the labor and duties required of him with reasonable safety, and a servant has a right to presume that the company has, in these respects, done its duty, and a servant does not assume risks flowing from his employer's negligence in these duties, nor is there imposed upon him any duty of watchfulness and care to discover defects in the roadway and switches when he has no notice of danger, and when not so glaring and apparent as to be open to the observation of ordinarily prudent men, and when not specially directed thereto by his employer, and he will not be presumed to know of danger therein when of such a character that they might well escape the observation of a prudent person.

"8. A railroad company is required to use ordinary care in constructing and maintaining its roadway, switches, and

appliances, and appendages in such a manner and condition that its employee and servant can do and perform all the labors and duties required of him with reasonable safety, but the company is not required to furnish the best or safest appliances, or the latest improvements, and the servant has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by the exercise of ordinary care and precaution on the part of his employer, and the deceased, William Riley, if employed by defendant as brakeman, had the right to assume that the defendant had constructed and maintained its roadway, switches, appliances and appendages in such a manner and condition that as brakeman on its train he could perform his duties with reasonable safety, and if there was any such danger as was not open and apparent, that he should have been warned thereof.

" 18. If the alleged dangerous and improper condition of the tracks and situation with the car on the side track was plain to be seen by Riley, or if he ought, as an ordinarily prudent person, to have seen or known of it, then there can be no recovery, and if he before had reasonable opportunity to see or know of the situation as touching the alleged condition of the tracks and car on the side track, then he is in law held to such knowledge; or if on or before the occasion of the killing he had knowledge or reasonable means of knowledge, as a man of ordinary prudence, of the condition of the track and car on the side track, and incurred the danger with such knowledge or means of knowledge, then there can be no recovery."

We think these intructions, taken in connection with the other instructions given, and viewed also in the light of the evidence, are correct statements of the law. Indeed, taking all of the instructions together, we think they fully and fairly present the law, and are quite as favorable to the appellant as could be asked. We are also asked to reverse the

judgment on the ground that the verdict was not sustained by the evidence, especially that the evidence does not show that the decedent was free from contributory negligence. As the evidence is conflicting, and there is evidence tending to sustain the verdict on all material points, we will not disturb it. We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 5, 1892; petition for a rehearing overruled April 9, 1892.

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No. 15,112.

KORRADY, ADMINISTRATRIX, v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

NEGLIGENCE.—*Railroad.—Injury Resulting in Death.— Widow and Children.—Implied Damage.—Presumption.*—Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kin folks sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children.

SAME.—*Answers to Interrogatories.—Question of Law.*—Where the facts covering the question of contributory negligence are fully stated in answers to interrogatories, or in a special verdict, it is the duty of the court to decide the question as one of law in cases where the facts lead to only one conclusion.

SAME.—*Railroad Crossing.—Contributory Negligence* —When a person voluntarily attempts to cross a track in front of a moving train which he sees not far distant approaching the crossing, he is guilty of contributory negligence, and can not recover.

SAME.—*Negligence of Defendant.— When Unavailing.*—If the plaintiff's negligence proximately contributed to his injury, he can not recover, no matter how negligent the defendant may have been, unless such negligence is so gross as to imply a wilful intention to inflict the injury.

SAME.—*Rate of Speed.—Municipal Ordinance.*--It does not excuse one who

attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed was eighteen miles an hour where a municipal ordinance limited the speed at that point to ten miles an hour.

INTERROGATORIES TO JURY.—*General Verdict.—What are Statements of Fact.*—Where the facts stated in an answer to an interrogatory are such as to preclude a recovery, the court must so adjudge, although answers upon other points may be favorable to the party who relies upon the general verdict. The statement that a person saw an approaching engine forty or fifty feet from him before he attempted to cross a railroad is the statement of a fact, and so is the statement that he attempted to cross and was struck by the locomotive.

SAME.—*Asking for General Conclusion.—Impropriety of.*—It is not error for the court to decline to permit an interrogatory to go to the jury which asks for a general conclusion, intermixing matters of fact with matters of law.

PLEADING.—*Complaint.—Damages.—Demurrer.*—If a complaint shows that the plaintiff is entitled to some damages or to some relief, although not so much or so great as that demanded, it will repel a demurrer.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

J. H. Baker and *F. E. Baker*, for appellee.

ELLIOTT, C. J.—The appellee's contention that the complaint is bad because it does not specifically show that actual damages were sustained by the widow and infant children of the appellant's intestate can not prevail. Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kin folks sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children. *Louisville, etc., R. W. Co.* v. *Buck*, 116 Ind. 566; *Board, etc.*, v. *Legg*, 93 Ind. 523; *Clore* v. *McIntire*, 120 Ind. 262 (264).

This presumption may, possibly, not extend so far as to entitle a plaintiff to recover actual or substantial damages without evidence, but it does prevail to save a complaint from overthrow where, as here, its averments are confessed by demurrer. The amount of damages that may be recovered depends, to be sure, upon the evidence, but where the intestate leaves a widow and infant children, the implication of law is that they sustained some injury which the wrongdoer must compensate in damages. It has long been the rule that if a complaint shows that the plaintiff is entitled to some damages, or to some relief, although not so much or so great as that demanded, it will repel a demurrer.

It has likewise long been the established rule that if the facts are undisputed, and one inference only can be drawn from them, the question whether there is or is not negligence becomes one of law. *Rogers* v. *Leyden*, 127 Ind. 50; *Board, etc.*, v. *Chipps*, *ante*, p. 56, and cases cited. The principle is the same whether the question concerns the negligence of the plaintiff or the negligence of the defendant. The principle stated makes it the duty of the court, where the facts covering the question of contributory negligence are fully stated in answers to interrogatories, or in a special verdict, to decide the question as one of law in cases where the facts lead to only one conclusion. *Cadwallader* v. *Louisville, etc., R. W. Co.*, 128 Ind. 518, and authorities cited.

In this case the facts exhibited in the answers to interrogatories fully cover the ground involved by the issue of contributory fault or no contributory fault. These are the facts: The plaintiff's intestate, John Korrady, had lived near the defendant's railroad tracks for several years and was familiar with the place where he attempted to cross them. He undertook to cross at a place where there were five tracks. He made the attempt to cross in the morning of a quiet day. The middle track was the main track, and the south tracks were side tracks. The engine by which he was struck was on the main track. As soon as Korrady crossed

the side track immediately south of the main track and before he attempted to cross the main track he looked to the west to see if any train was approaching. He saw the approaching train, and at that point there was nothing to obstruct his view. If he had stopped at a point five feet south of the south rail, he could have seen the approaching locomotive, and he did see it before attempting to cross. There was no sudden danger, nothing requiring him to go forward, but he might have remained in safety in the place where he saw the approaching engine. We think it clear that the intestate was guilty of contributory negligence. He was not only able to see the approaching locomotive, but he did see it, and, notwithstanding this, he undertook to cross the track. He made the attempt and incurred the hazard when there was no reason for doing so. The authorities are decisively against the right of recovery by one who voluntarily attempts to cross a track in front of a moving train which he sees not far distant approaching the crossing. *Indiana, etc., R. W. Co.* v. *Hammock*, 113 Ind. 1; *Ohio, etc., R. W. Co.* v. *Hill*, 117 Ind. 56; *Ohio, etc., R. W. Co.* v. *Walker*, 113 Ind. 196; *Heaney* v. *Long Island R. R. Co.*, 112 N. Y. 122; *Pakalinsky* v. *New York, etc., R. R. Co.*, 82 N. Y. 424; *Railroad Co.* v. *Houston*, 95 U. S. 697 (702); *Tully* v. *Fitchburg R. R. Co.*, 134 Mass. 499. The question is presented here as it was in *Cadwallader* v. *Louisville, etc., R. W. Co., supra*, but the facts are much stronger against the plaintiff in this case than they were in that case.

If a plaintiff's negligence proximately contributes to his injury, he can not recover, no matter how negligent the defendant may have been, unless such negligence is so gross as to imply a wilful intention to inflict the injury. *Cadwallader* v. *Louisville, etc., R. W. Co., supra.* As there is here no claim that the injury was wilfully inflicted, the case is to be treated as one of pure negligence. We can not take into consideration the negligence of the defendant upon the question of contributory negligence, for, conceding that it was

culpably negligent, there can be no recovery, as the negligence of the deceased proximately contributed to his injury. There is no fact, we may add, tending to show that the appellee wrongfully led the appellant's intestate into a perilous position, so that the case is the ordinary one of negligence at a crossing.

The appellant complains of a ruling of the trial court declining to permit an interrogatory to go to the jury. That interrogatory reads thus: "Is it not a fact that Korrady was not negligent in crossing Wide Alley where he did if he did not know said engine was approaching at a speed of more than ten miles an hour?" The complaint is not well founded. The appellant had a right to elicit the facts, but had no right to ask for a general conclusion, intermixing matters of fact with matters of law. *Bellefontaine R. W. Co.* v. *Hunter*, 33 Ind. 335; *Toledo, etc., R. W. Co.* v. *Goddard*, 25 Ind. 185; *Uhl* v. *Harvey*, 78 Ind. 26; *Louisville, etc., R. W. Co.* v. *Worley*, 107 Ind. 320; *Chicago, etc., R. R. Co.* v. *Ostrander*, 116 Ind. 259; *Pittsburgh, etc., R. W. Co.* v. *Adams*, 105 Ind. 151.

It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed is eighteen miles an hour at a place where a municipal ordinance limits it to ten miles an hour. The law is well settled that where a train is seen approaching it is contributory negligence to voluntarily attempt to cross the track upon the assumption that the speed is not greater than a municipal ordinance allows. *Cadwallader* v. *Louisville, etc., R. W. Co., supra*; *Railroad Co.* v. *Huston*, 95 U. S. 697 (702).

Running a locomotive at a rate of speed forbidden by a municipal ordinance is ordinarily negligence on the part of the railroad company, but such negligence will not excuse a person who assumes the risk of crossing in front of a train he sees and knows is approaching the crossing.

It is undoubtedly the law that a general verdict is not con-

trolled by answers to interrogatories, unless the conflict between the answers and the verdict is irreconcilable. Here that is the nature of the conflict. For it is settled as matter of law, as we have shown, that one who attempts to cross a railroad track in front of an approaching locomotive which he sees while in a place where he might remain with safety, is guilty of such contributory negligence as bars a recovery.

Where the facts stated in an answer to an interrogatory are such as preclude a recovery, the court must so adjudge, although answers upon other points may be favorable to the party who relies upon the general verdict. If facts are found which are fatal to a recovery, the court is bound to deny the plaintiff a judgment, whether such facts relate to one or to many points. A defendant who establishes a point which completely and effectually destroys the alleged cause of action must necessarily succeed. *Rice* v. *City of Evansville*, 108 Ind. 7 (11); *Lake Shore, etc., R. W. Co.* v. *Pinchin*, 112 Ind. 592 (597).

It is true that facts, and not evidence, are the only things of value in answers to interrogatories. But the statement that a person saw an approaching engine forty or fifty feet from him before he attempted to cross a railroad is the statement of a fact, and so is the statement that he made the attempt to cross and was struck by the locomotive. *Cadwallader* v. *Louisville, etc., R. W. Co., supra.*

Judgment affirmed.

Filed Jan. 16, 1892; petition for a rehearing overruled April 28, 1892.

No. 15,604.

VOREIS ET AL. *v.* NUSSBAUM ET AL.

131 267
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MARRIED WOMAN.—*Promissory Note.—Suretyship.—Innocent Purchaser.*—Under section 5119, R. S. 1881, a note made payable in bank, executed by a married woman as surety, is void as to her, in the hands of an innocent purchaser, for value, acquired in the regular course of business. She alone can claim the benefit of the statute.

SAME.—*Estoppel in Pais.—What is not.*—While a married woman is bound under our statute by an estoppel *in pais*, like any other person, the form of the contract (she signed the note apparently as principal) does not operate as such an estoppel where there was no statement or representation of any kind to indicate that she was the principal on the note.

SAME.—*Consideration Paid to Husband.—Suretyship of Wife.*—The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety and not the principal in the note, notwithstanding the form of the contract.

MCBRIDE, J., dissents.

From the Marshall Circuit Court.

J. D. McLaren and *E. C. Martindale*, for appellants.

M. A. O. Packard and *C. P. Drummond*, for appellees.

MILLER, J.—The appellant contends that the court erred in its conclusions of law upon the special finding of facts.

A synopsis of so much of the finding as is necessary to present the questions of law involved, is as follows:

On the 19th day of November, 1888, the defendant Lottie A. Voreis, who was at the time a married woman, executed her promissory note of that date, payable one year after date, to the order of William Bucklen, at a bank in Plymouth, and at the same time she, with her husband, George W. Vories, executed a mortgage upon her separate property to secure the payment of the note.

That George W. Voreis, her husband, received the consideration for which the note was executed, and used the same in the payment of his own individual debts, and for his

own use; but afterward gave his wife ten dollars of the money; that no part of the consideration was used for the betterment of her separate property or business.

That afterward, but before its maturity, the note was duly assigned to one Leonard Flagg, who, before its maturity, for a valuable consideration, and in the regular course of business, assigned it to the plaintiffs.

That the plaintiffs, as well as the assignors, at the time of the execution of the note, and of its assignment, had knowledge that the defendant Lottie was a married woman; that neither the payee of the note, the assignor Flagg, nor the plaintiffs, made any inquiry of the defendant Lottie A. Voreis or her co-defendant George W. Voreis, as to who received the consideration for the note, or who would receive the benefit therefrom; but that neither the assignor Flagg nor the plaintiffs had any actual knowledge or notice whatever that the consideration for the note was not received and used by said defendant Lottie for her own special use and benefit, and had no actual knowledge, or notice, that said note and mortgage were executed by the wife as surety for her husband.

That one of the plaintiffs, and the one who purchased the note from Flagg, and the defendants lived, at the time of such purchase, in Marmont, a small village in Marshall county, and were well and intimately acquainted.

The court, as a proposition of law from the foregoing facts, concluded that the plaintiffs were entitled to a recovery against the defendant Lottie, for the full amount of the note, and against both the defendants for a foreclosure of the mortgage, and judgment was rendered accordingly.

Since September 19th, 1881, there has been in force in this State the following statute, section 5119, R. S. 1881: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, con-

clusively establishes the proposition that she was a surety and not the principal in the note, notwithstanding the form of the contract. *Vogel* v. *Leichner*, 102 Ind. 55; *Cupp* v. *Campbell*, 103 Ind. 213; *Nixon* v. *Whitely*, 120 Ind. 360; *Crisman* v. *Leonard*, 126 Ind. 202.

The question to be decided is, does the statute above cited invalidate a note, made payable in bank, executed by a married woman as surety, in the hands of an innocent purchaser, for value, acquired in the regular course of business?

It seems to be the settled doctrine of the courts and text writers that a note executed in violation of a statute is void even in the hands of an innocent purchaser for value.

In Tiedeman Commercial Paper, section 178, it is said: "But where the statute, making the consideration illegal, declares a contract founded on such a consideration to be absolutely void, the language of the statute must be given its proper effect, and so the courts have held that the commercial paper founded on such considerations is void even in the hands of *bona fide* holders."

In *Vallet* v. *Parker*, 6 Wend. 615, it is said: "Wherever the statutes declare notes void, they are and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration.

In 2 Randolph Com. Paper the law is laid down in these words:

Section 517. "All contracts which violate the provisions of the statute law either expressly or by implication are void. And this is true, although the prohibition of the statute be not expressed, but must be implied from its nature and objects. Where a statute expressly declares the contract which forms the consideration of the note or bill to be void, the note or bill is illegal and void even in the hands of a *bona fide* holder for value. So, where the Legislature has pro-

hibited a transaction, a bill or note given for it is void." See, also, *Sondheim* v. *Gilbert*, 117 Ind. 71; *Spray* v. *Burk*, 123 Ind. 565.

The statute says that "A married woman shall not enter into any contract of suretyship," and follows this prohibition with the express declaration that any "such contract, as to her, shall be void." Stronger language could not have been chosen in which to express the legislative intent to prohibit the making of such contracts, and to declare that the consequence of a violation of the statute should be to declare the instrument *void*.

The presumption is that the word "void" was understandingly used by the law-makers, and this presumption is strengthened by the fact that the term correctly expresses the status of contracts executed in violation of statute, as established by the overwhelming weight of authority.

The statute was enacted to shield and protect married women from contracts from which neither they nor their estates could be benefited, and such contracts were, therefore, to be void as to them. We have therefore held that they alone can invoke the benefit afforded by the prohibition. *Plant* v. *Storey*, *ante*, p. 146; *Johnson* v. *Jouchert*, 124 Ind. 105.

We see no reason why, when they have elected to claim the benefit of the act, the words of the statute shall not be given the same force and effect that would have obtained if the words "as to her" had been omitted.

While the statute makes the contract of suretyship void as to a married woman, she alone can claim the benefit of the statute, and being, under our statute, bound by an estoppel *in pais* like any other person, it follows, logically, that she may in some cases be estopped by her conduct or representations from claiming the benefit of the statute. This is not an affirmance or ratification of a void contract, but an estoppel against the exercise of a personal right.

The cases in which married women have been estopped from claiming the protection of the statute are cases where

some statement, affidavit or representation has been made by the party to be estopped, which has been, in good faith, relied upon by the other contracting party, so that to permit her to show the truth would be to assist in the perpetration of a fraud. The cases of *Ward* v. *Berkshire Life Ins. Co.*, 108 Ind. 301, *Rogers* v. *Union Central Ins. Co.*, 111 Ind. 343, and *Lane* v. *Schlemmer*, 114 Ind. 296, are of this character.

In *Cupp* v. *Campbell*, *supra*, and *Lane* v. *Schlemmer*, *supra*, it was held that a married woman is not estopped by the mere form of the contract, which she has no power to make.

In this case there was no statement or representation of any kind to indicate that the appellant was the principal in the note, and received the consideration, except the form of the contract. This, we are satisfied, was not sufficient to constitute an estoppel to prevent her from showing who received the consideration and who did not. To hold otherwise would be to nullify the statute, and look to the form rather than to the substance of the transaction.

This was well expressed by McBride, J., in the late case of *Cummings* v. *Martin*, 128 Ind. 20, in these words: "It can not be doubted that one of the principal reasons for the enactment of the statute forbidding married women to enter into any contracts of suretyship, and making such contracts void as to them, was to prevent them from squandering or encumbering their property as sureties for improvident husbands. The courts have rightfully shown a disposition to scan closely contracts where there was reason to suspect that the transaction, while in form a contract, with the wife as principal, was, in fact, an attempted evasion of the statute, the consideration moving solely to the husband. Where this has been found to be true, it has uniformly been held that the contract is within the inhibition of the statute, and is void as to the wife."

Judgment reversed, with instructions to restate the con-

clusion of law in accordance with this opinion, and to render judgment for the appellant Lottie A. Voreis.

Filed April 27, 1892.

DISSENTING OPINION.

McBRIDE, J.—The note in this case was payable at a bank in this State. It was, therefore, upon its face, commercial paper, governed by the law merchant.

It was transferred, before due, to one who took it in good faith, in the ordinary course of business, and paid full value for it. The only fact shown by the record which is relied upon to invalidate it in the hands of the endorsee is, that he knew the maker was a married woman, and that although upon its face it purports to be what the endorsee in good faith supposed it was, her individual contract, it was in fact a contract of suretyship. The court expressly finds that the endorsee had no knowledge of this latter fact. The rule by which the innocent endorsee of commercial paper is protected against alleged illegality in its consideration is stated by eminent authority as follows: "The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition, which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule: That when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it. * * * There are a very few cases in which the statute renders such instruments absolutely void; and the most important, if not the only in-

stances now to be met with, are the statutes against usury and gaming." Daniel Negot. Inst., section 197.

While the letter of the statute, section 5119, R. S. 1881, is, that contracts of suretyship by a married woman "as to her shall be void," the spirit of the statute, as repeatedly interpreted by this court, makes them voidable, and not void. Indeed, in the case of *Bennett* v. *Mattingly*, 110 Ind. 197, the court expressly decided that such contracts were not void, but voidable. See, also, the case of *Plant* v. *Storey*, *ante*, p. 146, deciding the same thing. The statute does not purport to declare them absolutely void, but only void *as to her*. The option is with her to repudiate them. If she declines to interpose the defence, no one else can do so. The defence is purely personal. The logic of *Johnson* v. *Jouchert*, 124 Ind. 105, also is, that such contracts are voidable and not void. See, also, the many cases there cited. Not even privies in estate can avoid such contracts without her cooperation.

The voidable rather than void character of such contracts is easily demonstrable, and is logically and unerringly certain if there is any consistency whatever in the many recent decisions of this court relating to that subject.

The last clause of section 5117, R. S. 1881, provides that a married woman "shall be bound by an estoppel *in pais* like any other person." It has been many times decided that a married woman, contracting as surety, may be estopped to defend upon that ground. *Ward* v. *Berkshire Life Ins. Co.*, 108 Ind. 301; *Rogers* v. *Union, etc., Ins. Co.*, 111 Ind. 343; *Lane* v. *Schlemmer*, 114 Ind. 296; *Bouvey* v. *McNeal*, 126 Ind. 541; *Cummings* v. *Martin*, 128 Ind. 20.

This could not be true if the contract was absolutely void. A transaction which is *void* can not be purged of its infirmity by means of an estoppel. *Martin* v. *Zellerbach*, 38 Cal. 300 (99 Am. Dec. 365); *Cook* v. *Walling*, 117 Ind. 9.

Cook v. *Walling*, *supra*, furnishes a most forcible illustra-

tion of this doctrine. Mary C. Walling was wife of Creed C. Walling. The husband absented himself for more than seven years. The wife, supposing him dead, married one Hughes. She bought land, taking the title in the name of Mary C. Hughes. She, with her reputed husband, Hughes, in the year 1875 mortgaged the land to one Kate C. Cook for a debt due to her. At that time, and for a year thereafter, she lived and cohabited with Hughes, and claimed him as her husband, and was reputed to be his lawful wife. In 1876 Creed C. Walling returned. His wife abandoned, and was divorced from Hughes, and resumed her relations as wife of Walling. It was held that the mortgage was absolutely void, because the lawful husband Walling had not joined in it, and that, being void, she was not estopped and could not be estopped to defend against it.

While the mortgage in that case was executed before the enactment of section 5117, *supra*, the same doctrine is reiterated in *Johnson* v. *Jouchert*, *supra*, relating to a transaction occurring in 1884, since that section became a law. I therefore feel amply justified by the authority of this court in insisting that such contracts are not absolutely void; that they are void only in a qualified sense, and that the word "voidable," instead of "void," would have much more accurately expressed the legislative meaning. To now hold otherwise would require the express overruling of *Bennett* v. *Mattingly*, *supra*, and *Plant* v. *Storey*, *supra*, and the tacit overruling of many other well considered cases. If this is true, it follows that *bona fide* holders of such notes are entitled to protection under the rule above quoted from Daniel on Negotiable Instruments, which is abundantly supported by authority. The cases seeming to assert a different doctrine are either cases where the contract is absolutely void (in which case no estoppel can avail), or they are cases decided in jurisdictions where, as in this State prior to 1881, a married woman can not be estopped by matter *in pais*.

This court has repeatedly decided that as the law now is

in this State, the ability of a married woman to contract is the rule, and disability is the exception. *Miller* v. *Shields*, 124 Ind. 166; *Arnold* v. *Engleman*, 103 Ind. 512; *Rosa* v. *Prather*, 103 Ind. 191; *Vogel* v. *Leichner*, 102 Ind. 55.

It has also decided that where a married woman executes her individual note, it is *prima facie* her individual contract. She is presumed to have received the consideration, and, if she asserts, notwithstanding the form of her contract, that it is a contract of suretyship, the burden is on her to establish that fact. *Miller* v. *Shields*, 124 Ind. 166 (174), *et seq.*

Where a married woman executes her negotiable note alone, it will be presumed to be for her individual debt, and not a contract of suretyship, for several good reasons:

1st. A person is presumed to intend to do what is within his right and power rather than what is beyond them. Lawson Presumptive Ev., Rule 68, p. 276; *Pool* v. *Morris*, 29 Ga. 395.

2d. The law forbids her to make any contract of suretyship, and the presumption is that any act was done of right, and not of wrong. Lawson P. Ev., Rule 16, p. 81.

3d. In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. Lawson P. Ev., Rule 15, p. 67.

4th. Negotiable paper is presumed to have been regularly negotiated, and to be, or to have been regularly held. Lawson P. Ev., Rule 15—sub-rule 3, p. 77; Randolph Com. Paper, section 1024.

5th. The expression of consideration (which is found in express terms on the face of this note) of itself raises a presumption of consideration moving from the payee *to the maker*. Randolph Com. Paper, section 178, and authorities cited; also, sections 562, *et seq.*, and authorities cited.

6th. Every one is presumed to know the law. This applies to married women, in common with all other persons. They are, therefore, presumed to know that a promissory

his family reside, is situated on the lots; that the lots are near the center of the city, and, with his residence thereon, are of the value of four thousand dollars; that with full knowledge of all the facts the appellants, regardless of the rights of the appellee, and of the safety, peace, comfort and lives of himself and family, have, without his consent and over his objections, within the last forty days, dug and constructed a natural gas well, to the depth of about one thousand feet, and about two hundred feet distant from the appellee's residence, with only a street forty feet in width between the appellee's lots and the lot on which the well is sunk; that the appellants are about to "shoot" said well, and will do so unless restrained; that for the purpose of "shooting" the well, the appellants, about midnight of the — day of August, 1889, unlawfully procured to be brought, and unlawfully permitted a large quantity of nitro-glycerine, or other nitro-explosive compound, to be and remain upon Sycamore street, a public street in the city, and within less than two hundred feet of appellee's residence, for about three hours, in the midst of and surrounded by a large number of people; that appellants, by their employees, threatened and attempted to "shoot" said gas-well, and that they still threaten so to do with their said nitro-glycerine, or other nitro-explosive compounds, and will so do unless restrained; that nitro-glycerine is highly explosive and very dangerous to property and life, and is liable to explode under any and all circumstances, and at any time or place, and that an explosion of sixty or one hundred quarts of said explosive, at any given place on the surface of the earth could, and probably would, destroy life and property for a distance of five hundred yards in all directions from such explosion; that the handling or storing thereof in or about appellants' gas-well will endanger the lives of his family, as well as the safety of his property, and that the shooting of said well with nitro-glycerine will greatly injure and damage the appellee's said property both above

and under the surface of the earth, and endanger his life and and the lives of his family.

This complaint was verified, and upon it, and the affidavits filed in support of its allegations, the court granted a temporary injunction, from which this appeal is prosecuted.

The affidavits filed by the appellee tended to prove that the appellants' gas-well is within the corporate limits of the city of Greenfield; that a short time prior to the filing of the complaint in this cause, the appellants deposited in or near the derrick at the well, described in the complaint, about one hundred and seventeen quarts of nitro-glycerine, weighing about three hundred and forty pounds, with the intention of exploding the same in the well. The affidavits further tend to show that nitro-glycerine is very explosive, and that it is liable to explode at any time; that the explosion of that quantity of nitro-glycerine upon the surface of the earth would be likely to destroy life and property at any point within five hundred yards of such explosion.

It is contended by the appellants:

First. That they had the right to use their own property as to them seemed best, and, for that reason, they could not be enjoined from exploding nitro-glycerine in their well for the purpose of increasing the flow of natural gas, though such explosion might have the effect to draw the gas from the land of the appellee.

Second. That as bringing nitro-glycerine into the corporate limits of a town or city in a greater quantity than one hundred pounds is made a crime by statute, it can not be enjoined.

On the other hand, it is contended by the appellee:

First. That natural gas is property, and that the appellants have no legal right to do anything upon their own land which will draw such gas from his land, and appropriate it to their own use.

Second. That as he is liable to suffer an injury peculiar to himself, to which the public in general is not subject, by the

unlawful act of the appellants in bringing nitro-glycerine within the corporate limits of Greenfield, he is entitled, for that reason, to an injunction.

It has been settled in this State that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. *State, ex rel.*, v. *Indiana, etc., Co.*, 120 Ind. 575.

Water, petroleum oil and gas are generally classed by themselves as minerals possessing, in some degree, a kindred nature. As to whether the owner of the soil may dig down and divert a well defined subterranean stream of water there is much diversity of opinion and conflict in the adjudicated cases, but the authorities agree that the owner of a particular tract of land may sink a well and appropriate to his own use all the percolating water found therein, though it may entirely destroy the well on his neighbor's land. Angell Watercourses, section 112; *Hanson* v. *McCue*, 42 Cal. 303; *Wheatley* v. *Baugh*, 25 Pa. St. 528; *Frazier* v. *Brown*, 12 Ohio St. 294; *Acton* v. *Blundell*, 12 M. & W. 324; *Delhi, Trustees, etc., of*, v. *Youmans*, 50 Barb. 316; *Mosier* v. *Caldwell*, 7 Nev. 363; *New Albany, etc., R. R. Co.* v. *Peterson*, 14 Ind. 112; *City of Greencastle* v. *Hazelett*, 23 Ind. 186.

It is a familiar maxim that in contemplation of law land always extends *downward* as well as upwards, so that whatever is in a direct line between the surface of any land and the center of the earth belongs to the owner of the surface. Mr. Angell says that it would seem to follow from this maxim that whether what is *subterranean* be solid rock, mines or porous soil, or salt springs, or part land and part water, the person who owns the surface may dig therein and apply all that is there found to his own purposes *ad libitum.* Angell Watercourses, section 109.

Upon this principle it was held by this court in the case of *New Albany, etc., R. R. Co.* v. *Peterson, supra,* that if an adjoining land-owner, in lawfully digging upon his own land,

draws the water from the land of another, to his injury, such injury falls within the description of *damnum absque injuria*, which can not become the ground of an action.

In the case of *Haldeman* v. *Bruckhart*, 45 Pa. St. 514, it was said: "The purchaser of lands on which there are unknown subsurface currents, must buy in ignorance of any obstacle to the full enjoyment of his purchase indefinitely downwards, and the purchaser of lands on which a spring rises, ignorant whence and how the water comes, can not bargain for any right to a secret flow of water in another's land."

Mr. Gould, in his work on "Waters" (2d ed.), section 291, says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word land, and is a part of the soil in which it is found. Like water, it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

In recognition of the principle here announced, in the case of *Brown* v. *Vandegrift*, 80 Pa. St. 142, it was said by the court that "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment."

What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas.

In the case of *Westmoreland, etc., Gas Co.* v. *De Witt*, 130 Pa. St. 235, it was said: "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain.' * * They belong to the

owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

It is not denied by the appellee in this case that the appellants have the perfect legal right to sink a well into their own land and draw therefrom all the gas that may naturally flow to it; but he contends that they have no right to explode nitro-glycerine in the well to increase the natural flow.

When it is once conceded that the owner of the surface has the right to sink a well and draw gas from the lands of an adjoining owner, no valid reason can be given why he may not enlarge his well by the explosion of nitro-glycerine therein for the purpose of increasing the flow. The question is not as to the quantity of gas he may take, but it is a question of his right to take the gas at all.

So far as this suit seeks to enjoin the appellants from exploding nitro-glycerine in their gas well, upon the ground that it will increase the flow of the gas to the injury of the appellee, it can not, in our opinion, be sustained.

The rule that the owner has the right to do as he pleases with or upon his own property is subject to many limitations and restrictions, one of which is that he must have due regard for the rights of others. It is settled that the owners of a lot may not erect and maintain a nuisance thereon whereby his neighbors are injured. If he does so, and the injury sustained by such neighbor can not be adequately compensated in damages, he may be enjoined. *Owen* v. *Phillips*, 73 Ind. 284.

If the appellants in this case have been guilty of the folly of sinking a gas well in the center of a thickly populated city where they can not collect the necessary quantity of

nitro-glycerine to shoot it without endangering the property and lives of those who have no connection with their operations, they should be content with such flow of gas as can be obtained without such shooting. It certainly can not be maintained that the destruction of human life is an injury which can be compensated in damages. No authority has been cited, and we know of none, supporting the position of the appellants that the appellee is not entitled to an injunction because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. It has long been settled that a private citizen may maintain an action for a public wrong if he suffers an injury peculiar to himself and not sustained by the public in general. Blackstone Commentaries, bk. 3, p. 219; *Powell* v. *Bunger*, 91 Ind. 64; *Ross* v. *Thompson*, 78 Ind. 90; *Cummins* v. *City of Seymour*, 79 Ind. 491; *McCowen* v. *Whitesides*, 31 Ind. 235; *Fossion* v. *Landry*, 123 Ind. 136; *First Nat'l Bank, etc.*, v. *Sarlls*, 129 Ind. 201; *Adams* v. *Ohio Falls Co.*, *post*, p. 375.

The sufficiency of the complaint, as it would be when tested by demurrer, is not involved here.

This is a mere temporary injunction. To authorize the court to grant such relief it was not necessary that a case should be made that would entitle the appellee to relief at all events at the hearing. In such cases it is sufficient if the court finds, upon the pleadings and evidence, a case which makes the transaction a proper subject for investigation in a court of equity. *Spicer* v. *Hoop*, 51 Ind. 365.

In our opinion the court did not err in granting the temporary injunction in this case.

Judgment affirmed.

Filed April 27, 1892.

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No. 15,561.

PIERCE ET AL. v. THE ÆTNA LIFE INSURANCE COMPANY ET AL.

DRAINAGE—*Act of March 9th, 1875.—Lien of Assessment Under.—Priority of Mortgage Lien.*—Under the act of March 9th, 1875 (Acts of 1875, p. 97), an assessment for the construction of a ditch is not a lien upon the land benefited superior to a prior mortgage thereon. The act, indeed, contains no provision making the assessment a lien upon the land benefited.

From the White Circuit Court.

T. F. Palmer, for appellants.

G. W. Bushnell, E. B. Sellers and *W. E. Uhl*, for appellees.

MCBRIDE, J.—A question meets us at the threshold of this case which renders unnecessary the consideration of several questions argued by counsel.

This was a suit by the appellee for strict foreclosure of a mortgage on land, which was executed September 12th, 1877. The appellants claim a prior lien on the land by virtue of an assessment for the construction of a ditch. The petition for the location of the ditch was filed July 23d, 1878. The order establishing it was made by the board of county commissioners September 5th, 1878. The statute under which the ditch was constructed was that of March 9th, 1875; Acts of 1875, p. 97. That statute contained no provision declaring assessments liens upon the lands benefited. It provided that the assessments made should be placed upon the tax duplicate and collected as "other taxes," etc. It did not, however, attempt to declare that they were taxes, and it is manifest they were not. Nor did it declare that they should have the lien of taxes. They were simply collected by the same processes and agencies as were used in the collection of taxes. As was said in *State, ex rel.*, v. *Ætna Life Ins. Co.*, 117 Ind. 251, we do not doubt the power of the Legislature to provide that such assessments shall be a lien on lands benefited,

and, also, to provide that the lien shall have priority over pre-existing mortgages. Indeed, there would seem to be much reason for providing that a mortgagee, whose security is enhanced in value by the construction of a public drain, should have the lien of his mortgage subordinated to the lien of a fair assessment for the cost of its construction. Necessarily, however, before the rights of a lien-holder could be thus affected he would be entitled to his "day in court," and the statute in question contains no provision for notice to lien-holders, or to any persons except owners.

We can only declare the law as it is, not as we may think it ought to be. If it is defective, so that the full measure of justice can not be meted out, the remedy must come from the law-making power. In addition to the case above cited, see on the question as to the relative priority of the lien of ditch assessments and mortgages, *Cook* v. *State, etc.*, 101 Ind. 446.

The rights of the appellants were clearly junior and subordinate to those of the appellee.

Judgment affirmed.

Filed April 27, 1892.

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No. 15,781.

Morris *v.* The Board of Commissioners of Switzerland County.

County.—*Unhealthy Condition of Jail.—Action for Damages.*—**A county can not be held liable in an action for damages resulting from a failure of the board of county commissioners to keep the jail in a healthy and inhabitable condition.**

From the Switzerland Circuit Court.

F. M. Griffith, for appellant.

G. S. Pleasants, for appellee.

OLDS, J.—The appellant was confined in the jail of Switzerland county from the 10th day of December, 1887, to the 10th day of December, 1888, by an order of the Switzerland Circuit Court, in pursuance of a judgment of said court on a charge of bastardy, and he brings this action for damages alleged to have been sustained by him on account of the condition of the jail, alleged to have become and to have remained out of repair on account of the failure and neglect of the board of commissioners of said county to put and keep it in repair, as is made their duty by statute; that said jail was badly ventilated, damp, dark and filled with impure and obnoxious air and gases, alleging in detail facts which made the jail unhealthy, and that the impure and unwholesome gases and odors escaping from the same had caused sickness in the neighborhood and in the family of the jailer.

There was a demurrer sustained to the complaint and exceptions reserved, and the ruling assigned as error.

The facts pleaded are sufficient to make a good complaint if the county was liable on account of such failure of duty on the part of the board of commissioners, or for damages resulting on account of a failure to keep the county jail in a pure and inhabitable condition.

The appellant cites and relies upon the sections of the statute making it the duty of boards of commissioners to build and keep in repair county jails, and the decisions of this court holding counties liable for injuries sustained by reason of defective bridges constructed by the counties. As to the rule holding counties liable for defective bridges, now so well settled in this State, in the case of *Board, etc.*, v. *Chipps*, *ante*, p. 56, it was said: "The decided weight of authority is that, in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair." This being true, while the doctrine as to bridges is so well settled that it should not be changed by judicial decision, yet it affords a valid reason for not extending the doctrine to

another class of cases, even if the logic of the rule would seem to include them. The most logical and generally accepted theory is, that political subdivisions, such as counties and townships, are created to give effect to and enable the citizens to exercise the right of local self-government. *State, ex rel.*, v. *Denny*, 118 Ind. 449; *White* v. *Board, etc.*, 129 Ind. 396. Such subdivisions are instrumentalities of government, and exercise authority delegated by the State and act for the State. As the State is not liable for the acts or omissions of its officers, neither should a political subdivision of the State be liable for the acts or omissions of its officers as relating to political powers. Prisons are constructed and maintained as one of the instruments of and as a means for the purpose of carrying out the police power of the State, and the duty of constructing and maintaining them is imposed upon the counties by the State. The State would not be liable for the acts of its officers in the management or keeping of them in repair, and certainly, in the absence of a statute to that effect, the counties would not be liable.

In the case of *White* v. *Board, etc.*, *supra*, the same question was involved as in this case, and it was there held that the county was not liable, and it is decisive of this case. In that case, speaking of the police power, the court said: "In caring for prisoners, a county exercises part of this great power by virtue of its delegation by the Legislature." *Board, etc.*, v. *Boswell*, 4 Ind. App. —, holds the same doctrine. In the case of *Summers* v. *Board, etc.*, 103 Ind. 262, it was held that counties are instrumentalities of government and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful physician for the poor.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed April 28, 1892.

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No. 15,608.

PUTERBAUGH v. PUTERBAUGH.

QUIETING TITLE.—*Conveyance of Land.—Oral Contract for.—Part Performance.—Complaint.—Motion to Make More Specific.*—The complaint alleged that the plaintiff was a nephew of the deceased, and had lived with him many years; that defendant was the sole heir of the deceased, and claimed to be the owner of the land described in the complaint, the title to which he was seeking to quiet; that deceased entered into a parol contract with the plaintiff agreeing to convey said premises to him, in consideration of love and affection, and for the further consideration that the plaintiff would assist with his labor, time and money in the erection of a house and barn on the premises, and take possession when married, and occupy the same and make valuable and permanent improvements, and that the plaintiff should pay deceased for life one-half of the crops raised on the premises. The complaint further alleged that the plaintiff accepted the proposition and performed his part of the contract in full, but that the deceased died without fulfilling his part of the agreement; that defendant claimed title to such premises, adverse to plaintiff, and that her claim was without right, and cast a cloud on plaintiff's title.

Held, that a motion to make the complaint more specific was properly overruled, and that it was not necessary to give the items of the consideration since it was not an action for the recovery of money.

Held, also, that as the complaint showed that, prior to deceased's death, the plaintiff had done all he had agreed to do, the time for making the conveyance was not material.

SAME.—*Complaint.—Compensation in Damages.*—Under the statutes of this State, in a suit to quiet title, where the plaintiff seeks relief upon an oral contract for the sale of land, it is not necessary to aver in the complaint that the plaintiff can not be compensated in damages resulting from a breach of the contract.

SAME.—*Action for.—Triable by Jury.*—The action to quiet title was not one "of exclusive equity jurisdiction prior to the 18th day of June, 1852" (section 409, R. S. 1881), but is a statutory action triable by jury, as were all actions at law when the statute of 1881 went into force. *Martin* v. *Martin*, 118 Ind. 227, distinguished.

REAL ESTATE.—*Parol Promise to Convey.—Statute of Frauds.—Part Performance.—Consideration.*—The fact that the plaintiff agreed to take possession as part of the consideration for the promised conveyance, did not destroy the effect of possession as part performance, taking the case out of the statute of frauds.

SAME.—*Consideration of Affection.*—The fact that affection formed an element of the consideration does not impair the force of the contract.

SAME.—*Special Verdict.—Possession as Tenant.*—The statement of the special verdict that relying on the contract with the deceased, and with his knowledge and consent, plaintiff and his wife entered into possession of the land in controversy, and had been in the peaceable, uninterrupted and exclusive possession thereof up to the death of the deceased and to the present time, excludes the inference that possession was taken as tenant, because it appears that it was taken under a contract for the conveyance of the land.

VERDICT.—*Special.—Substance of Issues.*—If the special verdict states such facts as sustain the substance of the issues, it is sufficient. It is not necessary that matters should be proved precisely as pleaded.

PRACTICE.—*Complaint.—Harmless Error.*—Where the jury found for the plaintiff on the second paragraph of his complaint, erroneous rulings respecting the first paragraph were harmless.

From the Cass Circuit Court.

D. C. Justice, S. T. McConnell and *A. G. Jenkins*, for appellant.

D. D. Dykeman, W. T. Wilson, G. C. Taber and *M. Winfield*, for appellee.

ELLIOTT, C. J.—The appellee alleges, in the second paragraph of his complaint, that he is the nephew of Henry Puterbaugh, deceased, and had lived with him, as his son, for twenty-four years; that the appellant is the sole heir of the deceased, and claims to be the owner of the land described in the complaint. The appellee also avers that Henry Puterbaugh, being then the owner of the land, entered into a contract with the appellee, and that the contract was, in substance, this: "The said Henry Puterbaugh, in consideration of love and affection, and for the further consideration that this plaintiff would assist with his money, time and labor, in the erection of a house and barn upon the premises hereafter named, and would take possession, when married, and occupy the same, and make valuable and permanent improvements; that he, the said Henry Puterbaugh, would convey to him the southeast quarter of Wapapashee Reserve. He, the said Henry Puterbaugh, further stipulated that the

plaintiff should pay him for one-half of the crops that might grow upon said premises, or be raised by this plaintiff upon said eighty acre tract of land." Following the statement of the terms of the contract are these allegations:

"That this plaintiff then and there accepted said proposition and assisted with his labor, time and money in the erection of said barn and house, and afterwards married, and in pursuance of said contract, and relying upon the same, moved upon said premises and took possession of the same, and under said contract, and relying upon the same, has ever since occupied and held possession of said lands, turning over one-half of the crops as agreed; that he has made lasting and valuable improvements, besides said house and barn, since he has been in possession of said premises, in reliance upon said contract, in this: he has dug and walled a well, graded a lot, on which the house stands, made walks, built permanent and lasting fences, set out shade trees which are now growing thereon, and has changed the fences so as to separate the said eighty acres of land from the other lands of the said Henry Puterbaugh, all with the knowledge and consent of the said Henry Puterbaugh, and upon the faith of the aforesaid contract; that the said Henry Puterbaugh, during his lifetime, frequently promised to convey by deed to this plaintiff said tract of land in fee simple, but before he carried out said intention he suddenly and unexpectedly died, intestate, without having executed any deed of conveyance to this plaintiff for the premises; that the plaintiff has demanded a deed of the defendant, which she has refused, and refused to carry out the contract, and denies the contract; that the said defendant is now claiming title to the aforesaid lands claimed by the plaintiff, adverse to the title of this plaintiff; that said claim of title on the part of the defendant is without right and unlawful, and casts a cloud upon this plaintiff's title."

There was no such error in overruling the motion to make the complaint more specific as entitles the appellant to a re-

versal of the judgment. The complaint shows the contract and the consideration, and, as the action is not to recover money, there was no necessity for giving the items of the consideration. The complaint alleges that the appellant promised to convey the land to the appellee, and with sufficient certainty shows the consideration for the promise. The time for making the conveyance was not material, inasmuch as the complaint shows that prior to the death of the vendor the purchaser had done all that he had agreed to do.

There can be no doubt that payment of the purchase-price of land, whether in money or in property, is not sufficient to take an oral contract for the sale of land out of the statute of frauds. *Felton* v. *Smith*, 84 Ind. 485; *Wallace* v. *Long*, 105 Ind. 522; *Green* v. *Groves*, 109 Ind. 519; *Edwards* v. *Estell*, 48 Cal. 194. If the appellant's counsel are right in asserting that taking possession of land pursuant to the terms of the oral contract has no greater effect than paying the agreed consideration in money, property or services, then this complaint is bad, because the contract is within the statute. But we think it clear that the position of counsel is untenable. It is quite plain that possession not taken under the contract would be wrongful, since no one can rightfully take possession of another's land without his express or tacit consent. If there is a contract and the possession is rightful, the possession must be pursuant to the contract and in performance of it, for if it were not, it could not be rightful. Every contract for the conveyance of lands wherein provision is made for possession, implies that the possession shall be taken, if taken at all, under the contract. If it were otherwise, there could never be a rightful possession of land under an oral contract for its conveyance. The argument of counsel that, as possession was taken as part payment of the consideration, it is ineffectual, is plausible, but unsound. The possession of land under a contract is a performance of the contract on the part of the purchaser, and must, of necessity, always be in some sense a payment

of consideration, for otherwise it would be impossible to regard it as part performance. If not regarded as part performance it must be so regarded, for the reason that the purchaser did what he was required to do under the contract. We do not deem it necessary to cite authorities in support of our conclusion that the fact that the purchaser agreed to take possession as part of the consideration for the promised conveyance does not destroy the effect of possession as a part performance, taking the case out of the statute of frauds, for we think that every decided case which asserts that possession is such part performance as will take a case out of the statute expressly or impliedly affirms the same doctrine. It is the open, clear and strong character of the act of taking possession of land as owner, rather than the reason for taking possession, that makes it such part performance as takes the case out of the statute. *Johnston* v. *Glancy*, 4 Blackf. 94; *Atkinson* v. *Jackson*, 8 Ind. 31; *Cutsinger* v. *Ballard*, 115 Ind. 93.

The law is that possession of the land embraced in the contract must be taken under its provisions, or the statute will defeat an enforcement of the contract. If, therefore, it be true that the complaint does not show that possession was taken under the contract, this action must fail. But it is not true that possession was not so taken, for the complaint avers and the demurrer admits, that "the plaintiff, relying upon the contract, moved upon said premises, and took possession of the same, and under said contract, and has ever since occupied and held possession of said land." The cases of *Horn* v. *Godrick*, 33 N. H. 32, *Eckert* v. *Eckert*, 3 Pa. R. 332, *Poorman* v. *Kilgore*, 2 Casey, 365, and *Cox* v. *Cox*, 2 Casey, 375, are not in point, for here there was a contract founded upon a valuable consideration for the conveyance of a particular parcel of land, and it was under this contract, and not because of kinship, that the appellee entered into possession of the land and made improvements.

The fact that affection formed an element of the consid-

eration does not impair the force of the contract. The parties agreed upon a consideration valuable in its nature, and their agreement as to its sufficiency the courts will not disturb, since to do so would be to make a contract for parties capable of contracting. Where parties agree upon the adequacy of a valuable consideration, their agreement is conclusive in the absence of fraud or mistake. *Wolford* v. *Powers*, 85 Ind. 294 (44 Am. R. 16); *Colt* v. *McConnell*, 116 Ind. 249 (252), and cases cited.

Under the system which prevailed before the adoption of the code, it was generally held that a plaintiff seeking relief upon an oral contract for the sale of land must allege that he could not be compensated in damages resulting from a breach of the contract. But this was true only where purely equitable relief was sought, and sought in a court of chancery, and the reason why such an averment was necessary was that without it a court of chancery had no jurisdiction. That reason does not exist where there is only one form of action, and where equity and law jurisdiction reside in the same court. We have examined many of our cases, and we do not find that there was such an averment in any complaint in an action to quiet title, or even in a suit for specific performance. But, as we shall presently show, this case is not one of exclusively equitable cognizance, but is a statutory action.

The question whether an action to quiet title is one that can be tried by a jury as a matter of right is presented by the record. The proper demand for a trial by the court was made, the demand refused, exception entered to the ruling, and the proper specification embodied in the motion for a new trial. The court below did not submit the case to the jury merely to find facts as advisory, but submitted it to the jury to determine finally all questions of fact. If the action is one wherein a jury trial is demandable as a matter of right, the ruling was correct; if not, it was wrong. As we have

already indicated, our opinion is that there is a right to trial by jury in the statutory action to quiet title to land.

We preface our discussion of the question as to the mode of trial by affirming that this is not a suit for specific performance, but an action under the statute to quiet title. The plaintiff has title by virtue of his oral contract and the acts performed under it. All that he requires to a perfect legal title is the evidence of title. The title he has, the evidence—the deed—he has not. But as he is in possession under a valid and effective title, that title he may quiet. *Barnes* v. *Union, etc., Tp.*, 91 Ind. 301; *Heberd* v. *Wines*, 105 Ind. 237 (243); *Grissom* v. *Moore*, 106 Ind. 296; *Hyneman* v. *Roberts*, 118 Ind. 137. It has, indeed, been held that an action for possession may be maintained by a party who has a clear equitable title. *Burt* v. *Bowles*, 69 Ind. 1; *McNutt* v. *McNutt*, 116 Ind. 545 (564); *Stout* v. *Duncan*, 87 Ind. 383 (388); *Bibbler* v. *Walker*, 69 Ind. 362 (371). Title may pass by an equitable estoppel. *Pitcher* v. *Dove*, 99 Ind. 175 (177), and cases cited. The principle upon which such a title as that asserted by appellee rests, is, at the foundation, that of equitable estoppel, inasmuch as the courts declare that where there is a contract, possession, and valuable improvements, the vendor will not be heard to aver that his vendee has no title because he has not the evidence of title required by the statute of frauds.

Prior to the statute of 1881, all civil actions were, as of right, triable by jury. Section 409, R. S. 1881. That statute reads thus: "Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; all other issues of fact in all other causes shall be triable as the same are now triable." If we are governed by the words of the statute, it is quite clear that we must hold that the statutory action to quiet title is triable by a jury, since that action was not on the 18th day of June, 1852, one of "exclusive equitable jurisdiction." It is the creature of positive statute and not

of the courts of chancery. It did not come into existence as a suit of equitable cognizance, but as a statutory action. It can not, therefore, be within the letter of the statute of 1881, and, as appears from the provisions of other statutes, as well as from the general rules of law, it is not within its spirit.

The statute classes actions for possessions and actions to quiet title together. The answer of general denial admits all defences as well in one as in the other. Section 1055, R. S. 1881; *O'Donahue* v. *Creager*, 117 Ind. 372; *Hogg* v. *Link*, 90 Ind. 346. The rules of procedure are declared to be substantially the same in both. Section 1071, R. S. 1881. The statute providing who may maintain the actions applies to both of them, without so much as hinting a difference. Section 1073, R. S. 1881. A new trial of right is demandable in an action to quiet title, because it is placed under the same rules as an action to recover possession. *Zimmerman* v. *Marchland*, 23 Ind. 474; *Hunter* v. *Chrisman*, 70 Ind. 439; *Miller* v. *Evansville, etc., Bank*, 99 Ind. 272; *Hammann* v. *Mink*, 99 Ind. 279; *Bisel* v. *Tucker*, 121 Ind. 249. In the statutes and in the decisions the two statutory actions are uniformly treated as of the same class and as governed by similar rules. To attempt to divide the actions and bring them under diverse rules would be to oppose the express provisions of the statute and the steady current of judicial opinion.

The law as it comes from the law-makers does not divide the action to quiet title or the action to recover possession into subordinate classes; on the contrary, it plainly declares that there is one action of each class, but that both are governed by the same rules of procedure. If there is to be any subdivision into classes, it can only be done by judicial legislation, and that, as was said years ago, "is odious." It can not, as it seems to us, be legally possible that the statutory action to recover possession, which is substantially the same as the common law action of ejectment, may be sep-

arated into classes, one class triable by the court and another triable by a jury. If the one action can not be split into parts, neither can the other, for the statute in explicit terms places the two actions under the same general rules. If regard is had to the statute, it must inevitably follow that there is one statutory action to recover possession, and one to quiet title, and not many different actions, some triable by one tribunal and some by another.

Principle requires, as does the statute, that there should be a single action to quiet title, and not many actions triable in different modes. It is only by adherence to principle that confusion can be avoided. If it be conceded, as appellant's counsel contend, that an action to quiet title may be tried by a jury if the title asserted is a legal one, but by the court if the title asserted is an equitable one, we will often have a single case tried in part by a jury and in part by a court. This we say because it is establised law that a defendant may assert, by cross-complaint, an equitable title, although the plaintiff asserts a legal one, and in such a case, we should, if counsel are right, have the jury trying the issue as to the legal title, and the court trying the equitable title. But more than this, it might well happen that the verdict of the jury would be in favor of the one party and the finding of the court in favor of the other, and thus a conflict arise which could not be quelled by lawful means. There is even a more powerful reason for rejecting the appellant's theory that different issues are triable by different tribunals, although only a single result can possibly be attained. That reason is this: The statute in express terms, and the court without the slightest break, has affirmed that all defences, equitable and legal, are admissible under the general denial, and, this being true, it is simply and absolutely impossible for the court to determine in a case where the general denial is filed how the case shall be tried, if the theory of the appellant is valid. It is beyond the power of the courts to give effect to the law as it is written in such

cases upon counsel's theory, for no court in such a case could determine whether it should try the case or submit it to the jury. There is but one conclusion justified by the letter and spirit of the statute, or that can be defended on principle or given practical effect, and that conclusion is, that there is a single action to quiet title, and that such an action was not one "of exclusive equity jurisdiction prior to the 18th day of June, 1852," but is a statutory action triable by jury as were all actions at law when the statute of 1881 went into force. The words, "all other issues of fact shall be triable as the same are now triable," found in the statute of 1881, mean that issues in statutory actions for possession of land, and in statutory actions to quiet title, may be tried by a jury, for so they were triable when that statute took effect.

Thus far we have discussed the question without reference to the decided cases, and we now turn to them. The decisions directly upon the question explicitly declare that an action to quiet title is triable by jury. There can be no mistake as to what they decide, for their declarations are explicit and their language plain. *Trittipo* v. *Morgan*, 99 Ind. 269; *Johnson* v. *Taylor*, 106 Ind. 89. In other cases the doctrine of the cases cited has been fully asserted. *Kitts* v. *Willson*, 106 Ind. 147; *Lamb* v. *Lamb*, 105 Ind. 456; *Deig* v. *Morehead*, 110 Ind. 451. The decision in the case of *Spencer* v. *Robbins*, 106 Ind. 580, is not in conflict with the doctrine of the cases to which we have referred. There could be no conflict because there was no question in that case as to whether an action to quiet title was triable by a court or jury, for the only question decided in that case which seems to bear upon the present—and that bears upon it very remotely, if it all—was that there was no error in refusing to submit a single question of fact to a jury in an action to quiet title, although it would have been error to refuse to submit the whole case to the jury had the proper request been made. It is true that it was said in the course of the

opinion, that "Where the purpose of the action is primarily to establish an equitable right to land and acquire a legal title through such right by the decree of a court, as by the specific enforcement of an agreement, the reformation of a deed, or the establishment of a trust, etc., the case is of equitable cognizance." But, granting that the statements we have quoted are not mere *dicta*, still, they do not oppose our conclusion, for our conclusion does not assert that suits to enforce specific performance, establish trusts, or reform instruments, are triable by a jury. In the case of *Martin* v. *Martin*, 118 Ind. 227, one of the questions was as to the mode in which an issue joined upon a paragraph for specific performance of a contract should be tried, and in deciding that question, there could, of course, be no authoritative decision upon the question as to the mode of trial in the statutory action to quiet title. Another of the questions was as to the trial of an issue joined upon a complaint asserting a legal title, and it was held that the issue was properly submitted to a jury. Another of the questions appears in this statement of the opinion. "The eleventh reason is, that the court erred in requiring the jury to return a verdict upon the fifth paragraph of the complaint before the argument upon the whole case and the return of answers to questions tendered them upon the whole case." It is perfectly obvious that the question as to the mode of trial in an action such as this was not before the court for decision, and that what was said bearing upon the subject can not be regarded as authoritative. In that case the cases of *Kitts* v. *Willson*, *supra*, and *Johnson* v. *Taylor*, *supra*, are disapproved, but as the question decided in those cases was not involved we can not regard the disapproval as requiring us to overrule them. We are satisfied that they were well decided.

Our judgment is that the trial court did not err in submitting the case to a jury for trial.

The special verdict shows that the jury found in favor of the appellee upon the second paragraph of his complaint.

It appears, therefore, that rulings respecting the first paragraph were harmless even if erroneous.

It is suggested, rather than asserted, that the verdict is outside of the issues, and we are referred to the cases of *Boardman* v. *Griffin*, 52 Ind. 101; *Thomas* v. *Dale*, 86 Ind. 435; *Hasselman* v. *Carroll*, 102 Ind. 153. If the assumption that the special verdict is entirely outside of the issues is correct, the appellant's motion for judgment should have been sustained. We think it clear that where the material facts stated in a special verdict or special finding are wholly outside of the issues the defendant in such a case as this is entitled to judgment, for the plaintiff can only recover according to the allegations of his complaint. *Palmer* v. *Chicago, etc., R. R. Co.*, 112 Ind. 250. The question is properly presented by a motion for judgment on the verdict. *Dixon* v. *Duke*, 85 Ind. 434; *Johnson* v. *Culver*, 116 Ind. 278. But while we think that the question was appropriately presented by a motion for judgment on the special verdict, we do not think there was any error in overruling the motion. There was no error for the reason that the special verdict states such facts as sustain the substance of the issue, and it is a familiar elementary principle that it is sufficient if the substance of the issue be proved. It is not necessary that matters should be proved precisely as pleaded. The facts stated sustain the substance of the cause of action stated, and are fully within the issues.

There may be some conclusions and some evidence stated in the verdict, but, eliminating all such matters, there are substantive facts fully sufficient to authorize a judgment, and it is well settled that in such a case an appeal will be fruitless. *Terre Haute, etc., R. R. Co.* v. *Brunker*, 128 Ind. 542; *Bartholomew* v. *Pierson*, 112 Ind. 430; *Hammann* v. *Mink*, *supra*. The facts stated in the verdict are, so far as the material points of the case are concerned, quite as strong as the allegations of the complaint, and what we have said in considering the sufficiency of that pleading fully ap-

plies to the questions madé upon the special verdict, except, perhaps, as to one point. The appellant's counsel affirm that the verdict shows that the appellee entered into the possession of the particular tract of land as the tenant of his uncle, the vendor. We agree with counsel that the taking of possession as tenant, or continuing in possession under an entry as tenant, will not carry an oral contract out of the statute of frauds. *Green* v. *Groves*, 109 Ind. 519, and cases cited. But we can not hold that the familiar doctrine stated applies to this case, for the special verdict explicitly states that the contract was entered into between the parties, shows a valuable consideration yielded, shows that improvements were made, and shows under what right possession was taken. The statements of the verdict upon the question of possession are these: "And, relying upon said contract and in pursuance thereof, with the knowledge and consent of the said Henry Puterbaugh the plaintiff, with his wife, entered into possession of said eighty-acre tract of land, and has been in the peaceable, uninterrupted and exclusive possession of said land up to the death of the said Henry Puterbaugh and up to the present time." This finding excludes the inference that possession was taken as tenant, because it affirms that it was taken under a contract for the conveyance of the land.

We can not disturb the verdict upon the evidence.

Judgment affirmed.

Filed March 8, 1892; petition for a rehearing overruled April 28, 1892.

131	301
146	526
131	301
160	253
160	280

No. 15,979.

BALUE ET AL. v. SEAR.

PRACTICE.—*Answer.—Reply in General Denial.—Proof Under.*—The plaintiff, under a reply of general denial, is not confined to negative proof in denial of the facts stated in the answer, but may introduce proof of facts independent of those alleged in the answer, but which are inconsistent therewith, and tend to meet and break down the defence.

SUPREME COURT.—*Weight of Evidence.*—Where there is some evidence upon every material question necessary to sustain the finding of the court, the same will not be disturbed on appeal.

From the Marshall Circuit Court.

A. C. Capron and *W. B. Hess*, for appellants.

I. P. Gray, P. Gray, J. D. McLaren and *E. C. Martindale*, for appellee.

MILLER, J.—This was an action brought by the appellee against the appellants for the foreclosure of a mortgage executed by them to him for the sum of $7,000.

The defendant Marion Balue answered: 1st. That the note and mortgage were executed without any consideration whatever. 2d. That he admits the execution of the note and mortgage sued on, but says that the consideration for which they were executed has wholly failed in this: That the defendant was the owner of the land described in the mortgage, and desired to borrow the sum of $7,000; that the plaintiff undertook to procure a loan for that amount on the note and mortgage for the defendant; that for the purpose of enabling him to do so the defendant, joined by his wife, executed the note and mortgage in suit, and placed the same in plaintiff's hands for the purpose of being negotiated to procure said loan. But defendant says that plaintiff did not pay this defendant, or any other person for him, anything whatever on said note and mortgage, nor did he procure for defendant any money or loan of any kind on said note or mortgage, nor did he negotiate said note and mort-

gage, but, on the contrary, he has held the note and mortgage in his own possession, and has now wrongfully brought this action thereon. Wherefore, he says that the consideration has wholly failed, and he demands judgment.

The plaintiff replied by a general denial of each and every allegation contained in the answer.

A trial by the court resulted in a finding and judgment against the defendants for the full amount of the note.

The defendant asked for a new trial, assigning as causes therefor: That the finding of the court is not sustained by sufficient evidence; that the finding of the court is excessive in amount.

Error of law occurring on the trial and excepted to at the time by the defendant, in this, to wit, the court erred in allowing the plaintiff to testify to the sum of money paid by him upon the mortgage known as the Ray mortgage. The court erred in allowing plaintiff to introduce evidence tending to prove that after the execution of the note and mortgage he had paid certain sums of money in extinguishment of certain liens, taxes, water rents, and to complete the buildings on certain lots in Chicago, known as the Van Buren and Clinton street property, which property the plaintiff had purchased of this defendant in April, 1889.

Evidence was introduced on the trial of the cause by the appellant tending to sustain the defence pleaded in his second paragraph of answer. At the conclusion of the evidence introduced by the defendant the plaintiff was placed upon the witness-stand and permitted to testify, under the reply of general denial, in substance, as follows:

That the execution of the note and mortgage was not made to enable the plaintiff to procure a loan for the benefit of the defendant, but was executed to protect the plaintiff from loss on account of the mortgage and certain other claims which were or might become liens against certain property in Chicago which the defendant had conveyed to him, as well as to secure some prior loans made by the plaintiff to the defend-

ant; that the defendant failed to pay the mortgage, and the plaintiff had been compelled to pay a large sum of money in partial extinguishment of the claim, and also that he had been compelled to pay a sum of money on account of liens, taxes, water rents, and for the completion of a building which the defendant had agreed to complete, aggregating in all a sum of money in excess of the amount of the note and mortgage in suit.

The appellant contends that, under the reply of general denial, the only evidence that was admissible was such as tended directly to meet the evidence introduced by the defendant, and that a special reply was necessary to enable the plaintiff to show what had been done by him under the contract which he testified was the one entered into between the parties.

In this we think the appellant is in error. The plaintiff under a reply of general denial is not confined to negative proof in denial of the facts stated in the answer, but may introduce proof of facts independent of those alleged in the answer, but which are inconsistent therewith, and tend to meet and break down his defence. If the plaintiff admitted the facts stated in the answer, and was seeking to avoid them, by new matter, an affirmative pleading would have been necessary. 1 Works Pr., sections 579, 685.

The defendant, in his answer, alleged not only that the plaintiff did not procure a loan on the note and mortgage for the defendant, but that "plaintiff did not pay this defendant or any other person for him any thing whatever," and by his evidence went into that subject. This opened the door and permitted the plaintiff to give his version of the matter.

We are satisfied that the court did not err in receiving the evidence mentioned in the motion for a new trial.

Some other rulings of the court in the admission and rejection of evidence are complained of, but as they were not assigned as causes for a new trial, we can not consider them.

Assigning the rulings of the court in passing upon questions of the admissibility of evidence as error in this court does not bring them before us for review.

The appellant insists that the finding of the court was without the evidence. We have examined the record, and find that there was some evidence upon every material question necessary to sustain the finding. If the case was before us in such manner as to enable us to weigh the evidence, we would probably have arrived at a conclusion at variance with that of the circuit court, but we can not weigh evidence. *Isler* v. *Bland*, 117 Ind. 457; *McCarty* v. *State*, 127 Ind. 223.

We have examined this case upon the assumption that the substituted bill of exceptions is properly in the record. The conclusion at which we have arrived does not render it necessary for us to, and we do not, decide that question.

Judgment affirmed.

Filed Oct. 17, 1891; petition for a rehearing overruled April 28, 1891.

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131 304
131 509
131 304
140 15
141 303
131 304
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131 304
170 638
170 639

No. 16,542.

FISHBACK *v.* THE STATE.

CONTEMPT.—*Newspaper Publication.—Reflection Upon Court or Grand Jury.*—The publication of an article reflecting upon the grand jury, tending to bring them into disrepute, and to embarrass and interrupt a legitimate investigation by them as to the commission of a crime at any time during their session, is subject to the cognizance of the court, and the author thereof is liable for contempt.

SAME.—*Answer Purging of.—Language not per se Libellous.*—When the language used in a newspaper article is not *per se* libellous, and only becomes so by the use of innuendoes, and is fairly susceptible of an innocent meaning, in so far as any reflection upon the court is concerned, and the defendant answers under oath that he used it in a sense not libellous, and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive. The

disclaimer also applies to the grand jury. The judge himself can not assert facts existing in his own mind as against the answer. If he believes the facts stated are untrue, that issue may be tried, and the judge can testify as to the facts within his knowledge in a proper prosecution.

SAME.—*Language per se Libellous.—Insufficiency of Answer.*—If a newspaper article is *per se* libellous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, the publisher of the article can not escape liability for contempt by admitting the publication of the article, but denying that he intended the plain and mistakable meaning which the language used conveys.

SAME.—*What Necessary to Constitute.*—To constitute a contempt there must be an act coupled with an intended disrespect to or defiance of the court.

From the Vigo Circuit Court.

W. Mack, — *Henry*, *J. E. Piety*, *J. D. Piety*, *W. P. Fishback* and *W. A. Kappes*, for appellant.

A. G. Smith, Attorney General, for the State.

OLDS, J.—The prosecuting attorney of the Vigo Circuit Court, and of the Forty-third Judicial Circuit, filed his affidavit in said court, alleging, in substance, that in March, 1892, and prior thereto, the city of Terre Haute was engaged in building and repairing certain of her streets, and being desirous of building a sewer along and under one of her streets, her civil engineer, one Frank Cooper, was directed to make plans and specifications for such sewer, and to make an estimate of the cost of constructing the same; that Cooper made plans and specifications for such work, and estimated the cost thereof at $10,000, and the plans and specifications were adopted and approved by the city. And pursuant to law the city advertised for bids for the construction of the sewer, and received certain bids from various persons, stating amounts of each, and the contract was awarded to Frederick Fisher, his bid being the lowest, $14,-540,—each of the others was $15,000 and upwards; that afterwards, in March, 1892, it became and was a general

rumor in the city of Terre Haute, and it was published as a fact in two of the daily papers in said city, that certain of the bidders had combined and agreed to make the bids which they did, and that a certain firm should do the work and receive therefor $10,000, and $5,000 excess should be secretly divided between the others; that the bids made by the bidders were not good faith bids, and the work was not in fact worth more than $10,000, including reasonable profit for the contractor; that Fisher was not a member of the combination, and in consequence of his bid the object of the others was defeated. It was further rumored that the city engineer, Cooper, had been guilty of some fraud in connection with his duties as city engineer, and in connection with the planning of said sewer, and that he had entered into some combination with certain of said bidders.

It is alleged that it was believed by many of the citizens and residents of said city that said rumors and publications were true, and if true some crime or misdemeanor against the laws of Indiana had been committed; that, on the — day of March, 1892, the grand jury of Vigo county began an investigation of the letting of such sewer contract and of said alleged combination bids, and of the alleged misconduct of said Cooper and said contractors; that afterwards, on the 29th day of March, 1892, it was rumored in said city that the grand jury had ceased its said investigation in relation to the aforesaid matters and in relation to the alleged misconduct of said Cooper and contractors; that Cooper was a republican, and T. W. Kinser, of T. W. Kinser & Son, one of the bidders on said work, was a democrat; that the Honorable David N. Taylor, judge of the Vigo Circuit Court, and the prosecuting attorney, were democrats, and that the political sentiments of such persons were well known to the citizens and residents of said city and county; that, on the 30th day of March, 1892, the appellant, William O. Fishback, was the editor of "The Terre Haute Express," a daily newspaper published in Terre Haute, and having a large cir-

culation in said city and in the county of Vigo; that, on March 30th, 1892, said appellant printed and published, and caused and procured to be printed, the following editorials in the Terre Haute Express of said date:

1st. "The best reason for redoubled effort to get at the bottom of these contract scandals, is the fact that certain influences are being brought to bear to shut off serious investigation."

2d. "The Gazette called upon the grand jury to investigate Peker. Why, it won't even investigate a republican when a democratic contractor is involved. Suppose the Gazette consults its friend, Judge Taylor, early this morning."

3d. "The array of lawyers to defend those who are to be investigated in this city scandal increases day by day, and the array of democratic fine-workers, who are doing day and night work in the case under the direction of the democratic bosses, is also increasing. Some days ago the Express called attention to the fact that it had been demonstrated that in every instance where unusually excessive profit was to be secured by the action of public officials, that democrats were the beneficiaries. Democratic lawyers are also the ones who are the politicians outside the court-room. The intelligence and integrity of the citizens' committee is the safeguard now."

It is further alleged that the Terre Haute Evening Gazette is a daily democratic newspaper, published in said city of Terre Haute; that Peker, referred to in the second editorial set out, was a democratic trustee of Harrison township, in Vigo county; that the Gazette, referred to in this editorial, was the Terre Haute Gazette; that said Gazette had, prior to said date, published charges against said Peker of misconduct as such trustee, and urged that the grand jury investigate in regard to said Peker's alleged misconduct.

It is further alleged that said appellant intended the readers of the Express to understand that the grand jury would not investigate the alleged misconduct in relation to the letting of the contract for the building of said sewer; that by

the sentence, "Why it won't investigate a republican when a democratic contractor is involved," said appellant meant and intended the readers of the Express to understand that the grand jury would not continue the investigation it had begun, and which, according to rumor, had been stopped, and would not investigate the republican engineer, Cooper, because T. W. Kinser, a democratic contractor, was involved.

It is further alleged that by said editorials said appellant meant and intended to be understood by the readers of the Express as charging that certain democratic politicians of Terre Haute, denominated "bosses" in said editorial, had an undue and improper influence over the grand jury and Judge Taylor of the Vigo Circuit Court, and that through such influences such court had been induced to stop the investigation of the conduct of said Cooper and said contractors; and that it had been so induced to stop the work of the grand jury on account of T. W. Kinser, a contractor, being involved in said matter, and on account of the fact that said Kinser was a democrat; that by the sentence, "The intelligence and integrity of the citizens' committee is the safeguard now," said appellant meant and intended that the readers of the Express should understand, and meant to charge publicly that the Vigo Circuit Court, and the officers and grand jury thereof, could not be relied upon to investigate the alleged misconduct of said Cooper and contractors, and that such court could not be relied upon to bring such alleged offenders to justice in case any offence against the criminal laws of Indiana had been committed; that the readers of the Express understood the editorials and the various parts thereof according to the aforesaid intent and meaning of said Fishback.

Then follow averments denying the truth of the alleged charges, alleging that they are false, and alleging that the grand jury had not completed such investigation, that it was still continuing it, and had not adjourned, and was still in session, and that said editorials were so published by said

appellant for the purpose and with the intent of bringing the honorable Vigo Circuit Court, and the judge and grand jury thereof, into disrepute and disgrace, and with the purpose and intent of attacking the dignity and integrity of said court and its officers, and bringing said court into discredit with the people, and with the intent of embarrassing said court and its grand jury in the administration of justice in respect to the alleged misconduct of said contractors and said City Engineer Cooper.

Upon the filing of such affidavit the appellant was ruled to appear and show cause why he should not be attached and punished for contempt.

The appellant filed a verified answer to the affidavit, admitting that the said Gazette referred to in said editorial was the said Terre Haute Gazette, and that said Gazette had, prior to March 30th, 1892, published charges against said Peker of misconduct as such trustee, and had urged in its columns that the grand jury investigate said Peker on account of his alleged misconduct, and alleging that on Tuesday evening, March 29th, he was informed by George M. Allen that a member of the grand jury had said that the investigation of said sewer charges by the grand jury had commenced that day, but had been suddenly stopped; that the Peker referred to was the township trustee who, during the existence of the grand jury in the last month, had been publicly charged with malfeasance in office, and said Gazette had insisted on the grand jury investigating said charges, but he is informed and believes it was never done; that at the time he wrote said article he honestly believed from his information that the investigation of the said sewer cases was stopped for political reasons, affecting both Democrats and Republicans, and he desired the examination to proceed, and called upon the editor of the Gazette, who was a friend of the judge, and had been in favor of grand jury investigation, to consult him; that he was informed and believed, and still believes, that the investigation by the grand jury

had been stopped and further investigation abandoned by the grand jury the day before this publication was made; that on Monday of this week he applied to the judge of the circuit court for leave to obtain affidavits of the grand jurors by whom he expected to prove, and could prove, that it was stopped; that the court refused to give him permission to do so, and he was unable to procure the same without it; that if he had been permitted by the court to obtain said affidavits he could have proven that said examination was by the grand jury stopped, witnesses sent home, and had never been resumed, and would not be resumed again by this grand jury, whose power will expire with this term on the 16th, and he would have filed the same herewith to substantiate said facts; that the publications complained of in the Express were in three separate paragraphs, or articles, as follows: And copies of each are set out, being the same as hereinbefore set out in the affidavit, and which we have numbered 1st, 2d and 3d. It is then alleged that by the first paragraph he intended only to urge a vigorous investigation of the alleged fraud; that as to the third article the appellant says that the report has been published that in addition to the alleged fraud as to the Crawford street sewer, other large contracts for sewers and street paving, to cost something like $200,000, had been let by the council in which there were suspicions of collusion and fraud, and the citizens' committee of one hundred, is the commitee referred to in said article as "the safeguard," who would protect the people and the taxpayers, no matter how many prominent lawyers might be employed. He did not understand that the citizens' committee was investigating the criminal view of the case, but were especially willing to protect the taxpayers; that said third article did not name the court or jury, nor can it from any reasonable interpretation be made to refer to them; that in writing and publishing said articles he did the same in good faith without any intention or design to embarrass or obstruct the proceedings of said court or said investiga-

tion, and disclaims any intention of imputing corrupt motives to the court or of interrupting, embarrassing or obstructing the administration of justice; but on the contrary, was laboring in good faith to aid in the furtherance of justice, and asks to be discharged.

Upon the foregoing affidavit and verified answer the court found and adjudged the appellant guilty of contempt, and assessed his punishment at a fine of $100 and imprisonment in the county jail for the period of thirty days.

The appellant filed a motion for a new trial, which was overruled, and exceptions reserved, and this appeal is prosecuted.

The question presented is as to the correctness of the court's finding; whether or not under these pleadings the court was authorized to adjudge the appellant guilty of contempt.

This depends, first, upon the sufficiency of the affidavit filed by the prosecuting attorney, and, second, if the affidavit properly charges a contempt, whether or not the answer of the appellant to the charges is sufficient to purge the appellant of such contempt and entitle him to an acquittal.

The view we take of the answer, which we will more fully state in the course of this opinion, renders it unnecessary to scrutinize the affidavit charging the contempt with a view of determining with certainty whether it is technically sufficient to compel the appellant to show cause why he should not be fined for contempt or not, for the appellant has answered the charge, and if his answer is sufficient to purge him of the contempt if properly charged he is entitled to an acquittal. We therefore proceed to the consideration of the case, conceding, without deciding, that the affidavit is sufficient.

In treating of the subject of contempt, Bishop, in his work on Criminal Law (7th ed.), vol. 2, section 243, says: "No court of justice could accomplish the objects of its existence unless it could in some way preserve order and enforce its mandates and decrees. The common method of

doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid."

The decisions of this court have approved and adhered to this doctrine.

In the case of *Little* v. *State*, 90 Ind. 338, it is said: "Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, securing obedience to its process and rules, protecting its officers and jurors from indignity and wrong, rebuking interference with the conduct of business, and punishing unseemly behavior. This power is essential to the existence of the court. Without the power to punish for contempt, no others could, as decided in *United States* v. *Hudson*, 7 Cranch, 32, be effectively exercised. There is no doubt that the power to punish for contempt is an inherent one, for, independent of legislation, it exists, and has always existed, in the courts of England and America. It is in truth, impossible to conceive a superior court existing without such a power. The Legislature may regulate the exercise of this power—may prescribe rules of practice and procedure—but it can neither take it away nor materially impair it." See, also, *Cheadle* v. *State*, 110 Ind. 301.

We have in this case not a case of direct contempt, but a case of indirect or constructive contempt alleged to have been committed by the publication of these several articles in a daily newspaper, which are alleged, in view of the peculiar state of the public mind in the city in which said newspaper was published, were intended to, and did, prejudice the people against the court and grand jury, embarrass the administration of justice, and reflect upon the court and its proceedings.

In speaking of this class of contempts, in the case of *Cheadle* v. *State*, *supra*, the court says: "As regards indirect or constructive contempts, resulting from improper publications, Bishop, *supra*, in vol. 2, section 259, states the general

doctrine to be, that any publication, whether by parties or strangers, relating to a cause in court, which tends to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice, may be visited as a contempt, and this includes reflections on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel."

In the same case it is said: "The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceedings." Rapalje Contempts, section 56; 2 Bishop Criminal Law, section 262.

But as to the pendency of the action, it may be said that its pendency does not terminate with the return of the verdict of the jury or the rendition of the judgment, but may be said to be pending while it remains *in fieri*, for after judgment the parties are still in court for certain purposes. A motion for a new trial may be made and a new trial granted without additional notice.

As applicable to this case, though the grand jury may have stopped the examination, it was no bar to further investigation. It may have been renewed at any time, so that the publication of an article reflecting upon the grand jury, tending to bring them into disrepute and embarrass and interrupt a legitimate investigation by them as to the commission of a crime at any time during their session, would be subject to the cognizance of the court, and the author subjected to punishment if guilty of a contempt. The grand jury may be said to be open at all times during its session for the investigation of crimes of which they have jurisdiction, and the fact that they have made partial investigation and suspended, not intending at the time to pursue it further, does not prevent them from again taking it up and pursuing it.

In the case of *Burke* v. *State*, 47 Ind. 528, after a full review of the authorities, it is held that in a case of construct-

ive contempt, if the defendant appear and make a sworn statement that the matters in the affidavit are not true, and allege a state of facts consistent with his innocence, and avows that there was no intention to interfere, as in that case charged with the process of the court, he should be discharged, and that the court would not hear evidence of the truth of the original affidavit, or of the falsity of the answer.

This same rule is again held in the case of *Wilson* v. *State*, 57 Ind. 71, and in the case of *Ex parte Wright*, 65 Ind. 504, in speaking of constructive contempts the court says: "The judge can not, in a constructive contempt, from facts remaining in his own mind, exercise the judicial discretion resting in his breast, and grant either a rule *nisi*, or the writ of attachment. Such hidden facts can not be put upon record, nor pleaded to, nor controverted in any method known to judicial proceedings."

The authorities we have cited undoubtedly announce the true rule in cases where applicable, and must be followed in so far as applicable in cases of constructive contempts such as the one under consideration relating to the publication of a newspaper article, but there is a manifest distinction in newspaper articles which may be alleged to be libellous. If the article is *per se* libellous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, then it would be trifling with justice to say that in such a case the publisher could admit the publication, but deny that he intended the plain and unmistakable meaning which the language used conveys, but when the language used in an article is not *per se* libellous, and only becomes so, and made to apply to the court by the use of innuendoes, and is fairly susceptible of an innocent meaning in so far as any reflection upon the court is concerned, and the defendant answers under oath that he used it in a sense not libellous, and declares he intended no imputation upon the court,

either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive. If he swear falsely, he is liable to indictment and prosecution for perjury.

It must be remembered that while the right to punish for indirect contempt does and ought to exist in the court, and that in proper cases of clear and unqualified contempt, where parties seek by the publication of articles clearly and manifestly intended to bring the court into disrepute and to destroy confidence in it and embarrass the administration of justice, a court should not hesitate to exercise such power and punish the offender, yet such power is an arbitrary one, and if wantonly exercised would have a tendency rather to detract from than add to the respect and confidence reposed in the courts.

It is the judiciary that the people look to for protection of rights both of person and property, and it has the universal confidence of the people. Their acts are open to the world and all may judge of them, and an unjust and libellous assault upon a court by false or scurrilous articles usually proves more injurious to the author than the tribunal against which it is aimed, and it is not every comment which may seem to be uncomplimentary that a high and honorable court can deign to notice. *Stuart* v. *People*, 3 Scam. (Ill.) 395.

While the class of articles we have spoken of are unauthorized, and the publisher liable to punishment, on the other hand the public press have rights with which the court has no power to interfere, and it is indeed seldom that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary, and seek to control or improperly influence, or bring discredit upon it. It is legitimate and proper for the press to call the attention of the judiciary, the grand jury, and the officers of the law, to violations of law believed to have been committed, and ask that there be an investigation, and if a crime has been committed

that it be prosecuted. The acts of the judiciary are subject to fair and honest criticism the same as those of other public officers.

In the case at bar it seems to have been conceded by the prosecutor that the articles published in and of themselves did not cast any reflection upon the court such as rendered the author liable to be punished for contempt, for there was no attempt to make a charge against the appellant except by the aid of innuendoes, and if it were not so conceded we should be compelled to so hold.

The first article, standing alone, and it is conceded it was so published (the three were separate articles), has no application whatever to the court, or the grand jury, which is a part of the court, though a different rule in some respects might apply in the punishment of a contempt for the publication of an article relating to the grand jury and one relating to the judge. Certainly, reading that article would not suggest to the mind of any one, even if all the rumors alleged existed, and he had knowledge of them, that the editor intended to make a charge of improper conduct on the part of the court or grand jury. If it can be made the basis of a prosecution for contempt at all, it is only by reason of the extrinsic facts and innuendoes alleged. And of this article the appellant in his verified answer says he only intended to urge a vigorous investigation of the alleged fraud.

The interpretation of the appellant is the natural inference from the language; it is consistent with the language, and is the reasonable interpretation of it.

Much of what we have said as to this article is applicable to the third article. If read in the light of the facts alleged in the affidavit, we can not think it can fairly be interpreted as making any charge against the court or grand jury, and certainly it had no tendency to obstruct or embarrass the administration of justice, and as to this article appellant says it did not name the court or jury, and can not by any reason-

able interpretation be made to refer to them, and he explains its application.

The second article is of a somewhat different character, it names both the judge and the grand jury. It is in the nature of a criticism on the grand jury for failing to discharge their duty. It can hardly be said to have any tendency to corrupt, embarrass or obstruct the administration of justice, or to make any charge against the judge. The appellant sets out the facts in relation to the writing of the article, and that he had been informed and he believed the investigation had been stopped, that he still believes it, that further investigation had been abandoned by the grand jury, and that if he was permitted to take the affidavits of the jurors he could prove that it was stopped, and witnesses sent home, and the investigation never to be resumed again.

As to all of these articles the appellant says that in writing and publishing said articles he did the same in good faith, without any intention or design to embarrass or obstruct the proceedings of said court or said investigation, and disclaims any intention of imputing corrupt motives to the court or of interrupting, embarrassing or obstructing the administration of justice.

It is unnecessary to determine whether or not the specific explanation as to the second article is sufficient to relieve the appellant from punishment, or as to whether the answer in fact affirms that the grand jury had in fact stopped the investigation and did not intend to resume it, and in such event whether or not the article was but just criticism or complaint of the action of the grand jury in thus abandoning such investigation without having pursued it sufficiently to ascertain whether or not there had been any crime committed, for the general statement in conclusion as to the writing and publishing of all of the articles disavows all intention of imputing any corrupt motives to the court, or of intending to interfere with the administration of justice, and this disclaimer applies alike to the grand jury as well as the judge,

for it is conceded that the grand jury is a part of the court, and this, together with the other averments, constitutes a complete and full defence to the charge of contempt.

To constitute a contempt there must be an act coupled with an intended disrespect or defiance of the court. Language may be used which conclusively proves such intent, but where the intent is uncertain from the language, and an intended disregard of and disrepect to the court are disavowed under oath, and it is asserted that an innocent and consistent use of the language was intended, it purges the contempt.

In Rapalje on Contempts, at section 115, it is said: "Again, inasmuch as the essence of a contempt consists, to a great extent, in the wilful defiance of the court and its authority, the entire absence of 'any intention of committing a contempt of the court, or any purpose to destroy or impair its authority, or the respect due thereto,' is a good defence." *Weeks* v. *Smith*, 3 Abb. P. R. (N. Y.) 211.

In *Ex parte Moore*, 63 N. C. 397, the court found and stated as a fact of record that, of the judge's own knowledge, the investigation by said grand jury was pending on the 30th day of March, 1892, and was not fully determined at the time of the publication of the articles.

Where, as in this case, the charge of contempt has to be made by alleging the surroundings and rumors existing in the minds of the public at the time, and by innuendoes showing that language, innocent and inoffensive as ordinarily interpreted, was used and intended to be understood as conveying a meaning which showed a disrespect and disregard of the court is charged as a contempt, the verified answer avowing an innocent use of the language and a disavowal of any intended disrespect for the court, or that it was used to corrupt, obstruct or embarrass the administration of justice, the answer must, under the well-settled rule of law, be taken as a verity, and it constitutes a complete defence to the charge. *In re Woolley*, 11 Ky. 95; *United States* v. *Dodge*, 2 Gallison, 312.

The judge himself can not assert facts existing in his own mind as against the answer. In this the rule differs materially from that in case of a direct contempt. The defendant has verified an answer which constitutes a good defence. The court in such proceedings must take it as a verity. If the judge believes the facts stated are untrue, that issue may be tried, and the judge can testify to the facts within his knowledge in a proper prosecution.

It follows from the conclusion we have reached that the appellant was entitled to an acquittal on his verified answer in this case, and should have been discharged.

The finding of the defendant guilty was contrary to law, and the court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and to discharge him.

Filed April 22, 1892.

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No. 14,789.

The Chicago, St. Louis and Pittsburgh Railroad Company *v.* Fry, Administratrix.

Railroad.—*Personal Injuries.—Defective Appliance.—Knowledge of Company.—What Complaint Must Aver.*—In an action against a railroad company to recover damages for injuries resulting in the death of brakeman, which injuries it is averred in the complaint were caused by the defective condition of a brake-staff, it is essential, to authorize a recovery, that the plaintiff should allege and prove that the defect which caused the injury was known to the defendant, or was such as with reasonable diligence should have been discovered.

Same.—*Knowledge of Defect.—Special Findings.*—There can not be a recovery for the plaintiff in such an action, where the special findings of the jury not only do not state facts from which an inference of notice of the defect arises, but on the contrary states that upon inspections made at different times and places no defect was found in the brake-

staff, and that such defects as existed could not have been discovered without taking the brake-staff off the car and striking it with a hammer.

SAME—*Defective Appliance on Foreign Car.—Inspection of by Defendant Company.*—Where the car with the defective brake-staff did not belong to the defendant, but to another railroad company, and was only temporarily in use by the defendant, and came to it loaded, the fact that the car had been in the possession of the defendant for nearly two weeks prior to the accident, was not of itself sufficient to charge the defendant with notice of the defects. The inspection which a company is required to make of a foreign car, tendered it by another company for transportation over its lines, must be made with reasonable care, so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties, but it can not be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic will permit.

SAME.—*Answer.—Ignorance of Defect by Defendant.*—A paragraph of answer was good as a special denial to the complaint, which averred that the car, with the defective brake, was a foreign car, etc., and that the defendant had no knowledge of the defect before the happening of the accident and could not have discovered it by careful examination.

SAME.—*Answer.—Inspection of Appliances by Employees.—Rules of Company.—Reply.*—A paragraph of answer was filed to the complaint which set out a rule of the railroad company requiring its brakemen to examine and know for themselves that the brakes, ladders, etc., which they were to use were in proper condition, and if not to put them in condition, or report for repairs. It was further averred that the decedent had knowledge of this rule, but was negligent in failing to make an examination of the brake-staff and report it out of repair before the car left the point of starting on the trip on which he was injured. Ignorance of the defect on the part of the defendant was also averred.

Held, that while the above paragraph of answer was little more than a special denial of the complaint, it was not error to overrule a demurrer to the same.

Held, also, that a paragraph of reply to said paragraph of answer was good which showed that the deceased was not furnished with the appliances, nor had he the opportunity, to make the inspection required by the rules of the company.

From the Cass Circuit Court.

N. O. Ross and *J. C. Nelson*, for appellant.

G. N. Funk and *D. C. Justice*, for appellee.

MILLER, J.—The appellee, as the legal representative of

Daniel L. Fry, deceased, brought this action against the appellant to recover for injuries received by him while in the service of appellant as brakeman on a freight train, which caused his death.

The complaint charges that one of the cars of the defendant's train upon which the decedent was employed was what is called a "gondola" car, upon which the brake-staff was located at the end of and close to the edge of the car; that this brake-staff was dangerous and unsafe to be used for the purpose for which it was intended and provided, by reason of its being too light, weak and fragile, and for the further reason that at a point on the same at or near the ratchet wheel at the bottom surface of the deck or floor of the car it was cracked and broken on opposite sides to the depth of one-half an inch on each side, leaving only one-half inch in diameter of sound iron at that point; that it had been so cracked and broken for two months before the plaintiff's decedent was injured, and that the defendant had notice of its defective and unsafe condition for that length of time; that the said Daniel L. Fry was ignorant of its defective and dangerous condition, and was injured without fault on his part while in the discharge of his duties.

The defendant answered the complaint by a general denial and two affirmative paragraphs, which will be noticed hereafter.

The cause was submitted to a jury, and under the directions of the court a special verdict was returned, upon which a judgment was rendered in favor of the plaintiff.

The action of the court in rendering judgment in favor of the plaintiff and against the defendant is the only error assigned by the appellant in this court.

It is contended by the appellant that the facts found in the special verdict are insufficient to support a judgment against the company. The omissions pointed out are (1) that it does not find that the defendant had notice of the de-

fects in the brake-staff, or (2) that the decedent was ignorant of them.

It is also claimed that the plaintiff did not make out, but departed from, the case stated in the complaint.

The findings, so far as they relate to these questions, are as follows:

"*First*. We find that the defendant, on the 22d day of December, 1886, was the owner and was operating a railroad from Chicago, Illinois, to Columbus, Ohio, and passing through the State of Indiana, known as the Chicago, St. Louis and Pittsburgh Railroad, and had been operating the same for more than two years immediately preceding that time.

"*Second*. That on said day, and for about two years prior thereto, Daniel L. Fry, the decedent, had been and was in the service of said defendant as a brakeman, serving upon its freight trains, and that on said day, at about 3:25 o'clock in the morning, he started out on the second section of train No. 40, as rear brakeman, from Logansport, Indiana, and destined for Bradford Junction, in the State of Ohio.

"*Third*. That it was his duty as such brakeman to set brakes upon said train at all regular stopping places for said trains, and when so directed by the conductor and when brakes were called for by the engineer running the train.

"*Fourth*. That said Daniel L. Fry continued on said train, serving as rear brakeman, until the train reached a point about one and one-half miles west of the station of Woodington, in the State of Ohio, when the engineer called for brakes, and said Fry, who was then in the caboose, went forward, in answer to said call, for the purpose of setting the brakes, and that while in the act of setting the brake on the rear end of the first car in front of the caboose, the brake-staff of the brake that he was attempting to set broke off immediately under the ratchet wheel, and that said Fry was thereby caused to fall upon the track, and was run over by

the wheels of the caboose and injured, so that in about five hours thereafter he died from said injuries.

"*Fifth.* We find that the car upon which the brake-staff was fastened that broke and caused said Fry to fall and receive said injuries, was not owned by the defendant, but was a foreign car, owned by the Columbus, Hocking Valley and Toledo Railroad Company, and that on the 9th day of December, 1886, the defendant received said car from the owner, at Columbus, Ohio, loaded with coal, to be transported to Washington Heights, in the State of Illinois, and there delivered to the Chicago and Rock Island Railroad Company to be unloaded, and when returned to the defendant to be by it transferred back over its road to the owner at Columbus, Ohio; that said car, so loaded, was brought by the defendant as a part of one of its trains to Logansport, Indiana, on the 10th day of December, 1886, where said car was kept for repair until the 15th of said month, on which day it was taken to Washington Heights and delivered to said Chicago and Rock Island Railroad Company, in whose possession it remained until the 21st day of said month, when it was returned by the said company to defendant and brought to Logansport, Indiana, where it arrived at eleven o'clock P. M. of said day, and that on the next morning, the 22d, said car composed a part of the second section of train No. 40, occupying the position of the first car in front of the caboose, and started for Columbus, Ohio, about 3:25 A. M., with said decedent upon it, and that it proceeded in that position until the happening of the accident, as hereinbefore found.

"*Sixth.* That the defendant has at all times since it commenced operating said railroad, kept persons employed at Columbus, Ohio, Logansport, Indiana, and Washington Heights, Illinois, whose duties have been to inspect all cars passing over the road that stopped at either of said points, and when found to be out of order to report them for repairs, and that no car, when so reported, was permitted to

go out upon the road until repaired, and that said car was so examined by said persons when it was received at Columbus, Ohio, on the 9th day of December, 1886, and again on the 10th day of the same month at Logansport, Indiana, and again at Washington Heights, Illinois, on the 21st, and at Logansport again on the evening of the same day in the same month, and that in all said examinations said car was found to be in apparent good order by the persons making such inspections, except in the inspection at Logansport on the 10th, when said car was reported out of order and was repaired, and was again inspected after said repairs were made, and that in none of said inspections was any defect found in the brake-staff that broke on said car, and said car was not reported for repairs, or that it was out of order, except on the 10th, as above found, which defect was not in the brake-staff.

"*Ninth.* We find that said brake-staff was one and one-fourth inches in diameter, which was the size used for such purposes, and was of sufficient size, if sound; that said brake-staff, at the time of said accident, showed that it was cracked on each side and opposite each other to the depth of about one-fourth or three-eighths of an inch, and that the iron so cracked presented a rusty appearance, which is the only evidence before us of the length of time said cracks had been there; and we find that said cracks or breaks of said brake-staff were the cause of its breaking and causing the injuries received by said decedent.

"*Thirteenth.* We find that said brake-staff was weakened and cracked on each side, so that the defect could not have been discovered without taking it off the car and striking it with a hammer, and that this was not done in any of the inspections made; that at 3:25 o'clock in the morning of the day that Daniel L. Fry lost his life, and when the train started out from Logansport, it was dark and cloudy, and a snow storm was prevailing, and that it continued until Fry fell from the train and was killed, about 11 o'clock A. M. of

the same day; and that said Fry was called by the call boy to go out on said trip about one-half hour before train time."

In order to recover against the defendant it was essential that the plaintiff should allege, and prove, that the defect which caused the injury was known to the defendant, or was such as with reasonable diligence ought to have been discovered. *Pittsburgh, etc., R. W. Co.* v. *Adams*, 105 Ind. 151 (163); *Sack* v. *Dolese* (Ill.), 27 N. E. R. 62.

There is no finding in the verdict, in express terms, that the defendant had notice or knowledge of the defective condition of the brake-staff that caused the accident; the utmost that is claimed in that direction is, that it states facts, which raise an inference of knowledge, or of an opportunity, by the use of reasonable diligence, to acquire knowledge of such defects.

It is the office of a special verdict to find the ultimate facts, and not merely to state the evidentiary facts. The court can only draw such inferences as irresistibly result from the facts found by the jury. *Gordon* v. *Stockdale*, 89 Ind. 240; *Locke* v. *Merchants' Nat'l Bank*, 66 Ind. 353; *Stix* v. *Sadler*, 109 Ind. 254.

It requires no study of the findings of the jury to determine, not only that they did not find facts from which an inference of notice of the defects arises, but that on the contrary they find that upon inspection made at different times, and places, no defect was found in the brake-staff, and that such defects as existed could not have been discovered without taking the brake-staff off the car and striking it with a hammer.

It is insisted by the counsel of the appellee, that the fact that the car had been in the possession of the company for nearly two weeks was of itself sufficient to charge the company with notice, and they cite in support of the proposition *Fay* v. *Minneapolis, etc., R. W. Co.*, 30 Minn. 231.

There is this important difference between these cases. In that case the jury fonnd that the company had notice of the

defect, and the court say in the opinion that the "defect in the car was readily discernible upon proper inspection."

The car which occasioned the injury having been received by the company loaded, and in the regular course of business, from another company for transportation over its lines, the receiving company owed to its employees the duty of making proper inspection and giving notice of its defects, if any were found. *Cincinnati, etc.. R. R. Co.* v. *McMullen*, 117 Ind. 439. If the car came to it with defects visible or discoverable by ordinary inspection, it should either have refused to receive it, or immediately repaired it sufficiently to have made it reasonably safe.

The inspection which a company is required to make of a foreign car tendered it by another company for transportation over its lines, is not a merely formal one, but should be made with reasonable care so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties. Patterson R. W. Ac. Law, sections 290, 291.

In the late case of *Missouri Pacific R. W. Co.* v. *Barber*, 44 Kan. 612, the court cites with approval from the opinion in *Gutridge* v. *Missouri Pacific R. W. Co.*, 94 Mo. 468, the following: "The defendant contends that it had a right to assume that the car, being a foreign one, was reasonably safe and fit for the uses for which it was being used. We do not agree to the proposition as thus broadly stated. If the car had obvious defects which rendered it unfit for use, defendant was under no obligation to receive it, and should not have received it. Cars coming from one road to another must necessarily be subjected to wear, and are liable to be rendered unfit for use in the course of transportation, and this must be known to the receiving company. It is but the result of the most common observation. While it is not incumbent on the receiving company, on the receipt of the car, to make tests to discover hidden defects, in the construction, or in the materials used in the construction, still it is bound to inspect foreign cars just as it would and

is required to inspect its own, after they have been in use. This duty devolves upon the company as much in the one case as in the other."

The company ought not, however, to be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic will permit. Patterson R. W. Ac. Law, section 290.

There is nothing in the special verdict indicating that there was anything unusual in the appearance of the car when it was received by the defendant company at Columbor; that called for any special inspection of its condition; if it was old, dilapidated, or obviously defective, a corresponding duty of careful inspection devolved upon the defendant, but we find nothing in the pleadings or verdict of the jury indicating that such was the case.

If the inspections to which the car was subjected were not thorough, that also was a proper subject of allegation and proof.

This is not one of the cases where proof of the accident is *prima facie* evidence of negligence. *Duffy* v. *Upton*, 113 Mass. 544; *Sack* v. *Dolese, supra.*

We are of the opinion that the verdict does not show either notice to the defendant of the defect complained of, or state facts from which we can infer notice, and for that reason the judgment of the court will have to be reversed.

We do not think the special verdict shows that the decedent is chargeable with notice of the defects in the brakestaff on account of which he was injured. Taking into consideration the nature and location of the defect, and his limited opportunities of inspection, it is highly improbable that he should have discovered the defects.

The conclusion at which we have arrived renders it unnecessary for us to examine and pass upon the claim made by the appellants that the case made by the verdict does not correspond with the allegations of the complaint.

The appellee assigns cross-errors upon the ruling of the

court in overruling the demurrers to the second and third paragraphs of answer, and sustaining the demurrer to the second paragraph of reply, which was addressed to the third paragraph of answer.

The second paragraph of answer states the same facts that are set forth in the fifth, sixth and eleventh findings of the jury, with the additional averment that the defendant had no knowledge of the defect before the happening of the accident, and could not have discovered it by careful examination.

This paragraph was good as a special denial of the complaint, and it was not error to overrule the demurrer.

The third paragraph of answer sets out a rule of the railroad company requiring its brakemen to examine and know for themselves that the brakes, ladders, etc., which they were to use were in proper condition, and if not to put them in condition, or report for repairs.

It is averred that the decedent had knowledge of this rule, but was negligent in failing to make an examination of the brake-staff and report it out of repair before the car left Logansport on the trip upon which he was injured. It also avers that the defendant was ignorant of the defect in the brake-staff.

This paragraph is little more than a special denial of the complaint, but we are satisfied that overruling the demurrer to the same was not erroneous.

The second paragraph of reply to the third paragraph of answer charges that the train, of which the defective car formed a part, left Logansport at 3 o'clock A. M. of the day the decedent was injured; that he was called by one of the "call boys" of the defendant thirty minutes before the leaving time of the train; that upon arriving at the train his time was occupied in cleaning lamps and displaying rear signal lanterns, and examining the couplings of the cars, and loosening the brakes of the train so that it could be started, all of which was part of his duties as rear brakeman, and

that, thereby, all his time was taken up until the train started; that there were thirty-eight cars in the train, and that it takes from twenty to thirty minutes to properly inspect a single freight car; that no appliances were furnished the decedent with which to make an inspection, and no time given him to inspect prior to the time the train started; that the morning was dark and cloudy, and the defendant had no lights in their yards, except the ordinary brakeman's lantern, and that the defect could not have been discovered by an inspection made with a lantern in the night time. It is also averred that a reasonable inspection made by the regular inspectors would have discovered the defects, but that the defendant negligently failed to have it so inspected; that from the time the train left Logansport the defect was hidden from the decedent, and that he was engaged in the performance of his duties, and had no opportunity to make an inspection on account of the continuous passage of the train.

A demurrer was sustained to this paragraph of reply.

We are of the opinion that the duties put upon the brakeman by the rule in question adds very little to the duties placed upon him by the rules of law. Something more than the mere making of a rule requiring brakemen to make inspection of the implements and machinery used by them, is necessary in order to shield the master from the consequences of a failure to perform the duties of furnishing safe implements and machinery imposed by law upon him. He must have the appliances and opportunity for making such inspection. The duty imposed by law upon railway companies of furnishing reasonably safe cars and appliances for the use of brakeman in its employ, is for the protection of life and limb, both of which are sacred in the eye of the law, and public policy forbids that the master should be, in any manner, relieved of that duty without providing for the performance of the same by some other agency as fully as required of the master.

The paragraph of reply under consideration shows very

clearly that the deceased had neither the appliances nor the opportunity to make the inspection required by the rules of the company, and he was thereby relieved of that duty in so far as it was imposed upon him by such rules.

In our opinion the court erred in sustaining the demurrer to the second paragraph of reply.

Some other questions are presented by the cross-assignment of errors, but inasmuch as they are extremely unlikely to occur upon another trial we decline to consider them.

The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of reply, all costs against the appellant back to the ruling upon the demurrer to the reply.

Filed Oct. 30, 1891; petition for a rehearing overruled April 28, 1892.

No. 15,764.

COLEMAN ET AL. *v.* FLOYD.

VENUE.—*Change of.—Setting Aside Judgment.*—Where a suit was begun in the Howard Circuit Court, and on application of the appellants was sent to the Clinton Circuit Court, and from that court, on appellee's application, was sent to the Grant Circuit Court, and after remaining there for nearly three months, the latter court, on its own motion, ordered the case back to the Clinton Circuit Court, a judgment rendered in the Clinton Circuit Court against the appellants should be set aside, the affidavit in support of the motion to set the judgment aside showing that the appellants had no knowledge until long after the judgment had been rendered that the cause had been transferred to the Clinton Circuit Court, and that they had a meritorious defence.

SAME.—*Transfer to Another County.—Validity of Transfer.—When Party Can Not Contest.*—Where a party obtains a change of venue from the county, and is instrumental in carrying the case to another county, he can not successfully assert that the case was not properly in the circuit court of the latter county, unless he can make it appear that there was no jurisdiction over the subject resident in that tribunal.

SAME.—*General Jurisdiction.—How Cause Can be Transferred.*—Where a court has general jurisdiction of the subject and the person, a cause can only pass from that court by a judgment. It can not be arbitrarily transferred to another tribunal. For a discussion of the distinction between jurisdiction of a person and jurisdiction of a particular case, see opinion.

SAME.—*Failure to Send Cause to Adjoining Circuit.—Jurisdiction.*—From the mere fact that on change of venue the case is not sent to an adjoining circuit as required by section 413, R. S. 1881, it does not follow that the circuit court to which it is sent has no jurisdiction. It can not arbitrarily send the case back after having assumed jurisdiction.

PRACTICE.—*Trial.—Failure of Party to Appear.*—Where a party fails to appear when a case is called for trial, a jury need not be impanelled to try the cause. The trial may be had before the court.

SAME.—*Suits to Enforce Liens.—How Triable.*—Suits to enforce liens are triable by the court.

SAME.—*Suit to Enforce Lien.—Money Judgment.—Complaint.—Demurrer.*—In a suit to enforce a lien, if the complaint is sufficient to entitle the plaintiff to a money judgment, it will prevail against a demurrer.

VENDOR AND VENDEE.—*Payment on Contract of Purchase.— Vendee's Lien.*—Where a vendee pays money to the vendor upon a contract for the conveyance of the land, and the latter can not or will not convey, the former may enforce a vendee's lien for the money paid upon the contract of purchase.

From the Clinton Circuit Court.

J. O'Brien and *C. C. Shirley*, for appellants.

J. V. Kent, for appellee.

ELLIOTT, C. J.—This suit was begun in the Howard Circuit Court. The appellants asked a change of venue, and the case was sent to the Clinton Circuit Court, and from that court it was sent by change of venue to the Grant Circuit Court, where it remained, duly docketed, from the 27th day of November, 1886, until the 22d day of February, 1887. On the day last named the Grant Circuit Court, on its own motion, ordered the case back to the Clinton Circuit Court. The case reached that court on the 29th day of March, 1887, and, on the 14th day of June, 1889, the appellants were called and the cause submitted to the Clinton Circuit Court for trial as upon the failure to appear for trial. A judg-

ment was entered against them. On the 5th day of October, 1889, the appellants moved to set aside the judgment. In the affidavit filed in support of the motion it was alleged that the venue was changed to the Clinton Circuit Court, then to the Grant Circuit Court, that the case was once continued by that court and then ordered back to the Clinton Circuit Court; that the appellants had no notice of the action of the Grant Circuit Court, and were ignorant of the fact that the case was on the docket of the Clinton Circuit Court; that they had no knowledge of the action of the latter court until the 25th day of September, 1889; that they have a valid and meritorious defence to the appellee's complaint, as set forth in their answers filed in the Howard Circuit Court; that they did not appear to the suit in the Clinton Circuit Court after its return to that court, and that they were residents of Howard county. The appellants' motion was overruled, and an exception properly reserved.

The change from the Clinton Circuit Court was granted upon the application of the appellee, and there was no objection to the order directing that the case should go to the Grant Circuit Court. Presumptively, therefore, the case went to the latter court through the instrumentality of the appellee. She applied for the change, and it was her duty to perfect it; hence we must assume that this duty was performed. As the appellee obtained the change and was instrumental in carrying the case to the Grant Circuit Court, she is not in a situation to successfully assert that the case was not properly in that court, unless she can make it appear that there was no jurisdiction over the subject resident in that tribunal.

It seems quite clear that if the parties had appeared and tried the case in the Grant Circuit Court, neither could have successfully urged that the proceedings were *coram non judice.* There was general jurisdiction of the subject and of the persons, and where such jurisdiction exists the proceedings are not void. There is an essential and clear distinc-

tion between jurisdiction of a subject and jurisdiction of a particular case. This difference is illustrated in the cases which hold that the failure to object to the exercise of jurisdiction by a court of equity waives the jurisdictional question, although if objection is duly made the case would necessarily go to a court of law. *Grandin* v. *Le Roy*, 2 Paige Ch. 508; *Le Roy* v. *Platt*, 4 Paige Ch. 76; *Truscott* v. *King*, 6 N. Y. 147; *Buffalo, etc., Co.* v. *Delaware, etc., Co.*, 130 N. Y. 152.

It is illustrated, also, in the cases which hold that, although an action may be brought in the wrong State or county, there may be jurisdiction where there is no seasonable objection. *Indianapolis, etc., R. R. Co.* v. *Solomon*, 23 Ind. 534.

The difference between jurisdiction of the subject and jurisdiction of the particular instance is stated and discussed in *Jackson* v. *Smith*, 120 Ind. 520 (522), *State, ex rel.*, v. *Wolever*, 127 Ind. 306 (315), *McCoy* v. *Able*, *post*, p. 417 and *Yates* v. *Lansing*, 5 Johns. 282. The decision in *Perrill* v. *Nichols*, 89 Ind. 444, even if sound, is not in point, for the reason that in that case there was no general jurisdiction. Here there was general jurisdiction over the general class of cases to which this case belongs. There was, at all events, much more than a naked usurpation of jurisdiction by the Grant Circuit Court.

The Grant Circuit Court did assume jurisdiction over the case under color of right and by invitation of the appellee. The case was placed upon its docket, was there for some months, and was once formally continued. There was, therefore, an assumption of jurisdiction by one court of general jurisdiction of a cause sent to it by another tribunal of equal rank, and we do not think it can be held that the court which assumed jurisdiction was an usurper. If it was not, there was jurisdiction; if jurisdiction, the case could only pass from that court by a judgment, for there was no right to arbitrarily transfer it to another tribunal.

We have given full consideration to the contention of the appellee, based upon the provision of the statute which requires a case to be sent to "a county in the same or in an adjoining circuit." Section 413, R. S. 1881. If it were granted that the Clinton Circuit Court did wrong in sending the case to the Grant Circuit Court, it would by no means follow that its decision was void, for the utmost that can be said is that the decision was erroneous. There was undoubtedly power to decide, and power to decide necessarily includes the power to decide wrong as well as right. *Snelson* v. *State, ex rel.*, 16 Ind. 29; *Ely* v. *Board, etc.*, 112 Ind. 361 (368); *Young* v. *Sellers*, 106 Ind. 101. An error may be committed in construing or applying a statute, no matter how clear or imperative its terms, as well as in any other ruling. If the concession be made that there was a clear and flagrant misconstruction or misapplication of the statute, still the only conclusion warranted by such a concession is that there was an erroneous ruling or decision. That decision, it is to be remembered, was procured and acquiesced in by the appellee, since she was the actor, and secured the order which carried the case out of the Clinton Circuit Court.

The record shows that the appellee secured the change of venue, and, as we have seen, the presumption is that the case was sent to Grant county by her procurement. If it was, she is in no situation to assail a ruling invited by her own act; at all events, she is not in a situation to be permitted to take an unconscionable advantage of her adversaries, and this she would be allowed to do if awarded a judgment in a case where there is a meritorious and valid defence, as we must assume there is in this instance.

We think it clear that the appellants' motion to set aside the judgment should have been sustained. They had a right to act upon the assumption that the case was still in the court to which it was sent upon the appellee's application. If the appellee had there taken judgment in due course, it

would unquestionably have been rendered in the exercise of that court's general jurisdiction.

The appellants are in error in assuming that where parties fail to appear where a causé is called for trial, a jury must be impanelled to try the cause. The decision in *Terrell* v. *State, ex rel.*, 68 Ind. 155, is in direct opposition to the statute, and was expressly overruled in *Love* v. *Hall*, 76 Ind. 326. The appellants are also in error in asserting that the cause is triable by a jury in any event. It is a suit to enforce a lien, and such suits are, as has been again and again decided, triable by the court.

The complaint is undoubtedly sufficient to entitle the appellee to a money judgment, and if good only to that extent, it will prevail against a demurrer. *Bayless* v. *Glenn*, 72 Ind. 5. But we adjudge that the facts pleaded entitle the appellee to a lien upon the land described in the complaint, inasmuch as the facts pleaded show payment of part of the purchase for land upon a contract which the vendor can not or will not perform. Where a vendee pays money to the vendor upon a contract for the conveyance of the land, and the latter can not or will not convey, the former may enforce a vendee's lien for the money paid upon the contract of purchase.

Judgment reversed.

Filed April 28, 1892.

No. 16,263.

Wilson et al. v. McClain et al.

Gravel Road.—*Board of County Commissioners.—Appeal to Circuit Court.*—In the matter of the establishment of a free gravel road, an appeal can only be taken to the circuit court from a final order of the board of county commissioners.

From the Park Circuit Court.

— *Davidson* and — *West*, for appellants.

S. D. Pratt, *T. W. Rice* and *J. T. Johnson*, for appellees.

McBride, J.—The appellants, with others, were petitioners for the establishment of a free gravel road in Park county, under the act of April 8th, 1885, Elliott Supp., section 1472 *et seq.* At the time the viewers and engineers submitted their report the appellants presented to the board of county commissioners their written motion, asking to be allowed to withdraw their names from the petition and to dismiss the proceeding so far as they were concerned. Leave was refused, and, on motion of the attorneys for the remaining petitioners, the board made the following order:

"And the board, being fully advised in the premises, sustains said motion, and said motion to withdraw, and remonstrance, are hereby overruled and dismissed, from which decision said remonstrators pray an appeal."

The record does not show that any other order was made or action taken by the board. The appeal was prematurely taken, and the record presents no question for our consideration. An appeal will only lie in such cases from the final order of the board. *Neptune* v. *Taylor*, 108 Ind. 459, and cases cited; *Tomlinson* v. *Peters*, 120 Ind. 237, and cases cited.

The circuit court did not err in dismissing the appeal.

Judgment affirmed, with costs.

Filed April 22, 1892.

No. 15,788.

Reddick et al. v. Lord et al.

Will.—*Fee Simple Estate.—The Word "Heirs" Construed.*—Where a will gave a certain share of the testator's real estate to his daughter, "M. R., and her heirs (exclusively)," she took a fee-simple title to the real estate subject to be disposed of and conveyed by deed in which her husband should join. The word "heirs" in the will is used in its technical legal sense, and vests a fee in the first taker.

From the Rush Circuit Court.

M. E. Forkner, D. S. Morgan and *D. Morris,* for appellants.

B. L. Smith and *C. Cambern,* for appellees.

OLDS, J.—John Ruby, Sr., died testate, disposing of his property by an item in his will as follows:

"I will and bequeath to my wife, Margaret, one-third of all I possess, either real or personal, after all my just debts are paid, to be entirely at her disposal. The other two-thirds are to be equally divided among my four children, namely, Susanna Weasner, Margaret Isley, Caroline C. Barrett and Mary Reddick, and her heirs (exclusively)."

The contention of the appellant in this case is that the devise to Mary Reddick conveyed to her only a life-estate and that the remainder vested in her children to the exclusion of her husband, and that she had no power to convey the same by deed in which her husband joined, and that such deed was void and conveyed no title.

This contention can not be sustained. The language of the will is plain, and unnecessary to be construed. It gives to Mary Reddick a fee simple title to the real estate, subject to be disposed of and conveyed by deed in which her husband joins. It is a case which clearly comes within the rule in *Shelley's Case.* The word "heirs" is used in its technical legal sense, and vests a fee in the first taker.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 21, 1892.

131 338
131 563

No. 15,622.

Shortle et al. v. The Terre Haute and Indianapolis Railroad Company.

Railroad.—*Construction of.—Writ to Assess Damages.—Statute of Limitations.*—A petition for a writ to assess the damages occasioned by the construction of a railroad over the petitioners' lands, under the provisions of sections 905-912, R. S. 1881, is barred by the fifteen years' statute of limitations.

Same.—*Remainderman May Apply for Writ.—Intervening Life-Estate.—Statute of Limitations.*—A remainderman is entitled to apply for the writ, and the intervening life-estate is no barrier to the exercise of the right to have his damages assessed. The fact that there is an intervening life-estate will not prevent the statute of limitations from running.

Same.—*Conveyance of Right of Way.—Answer.*—An answer to such a petition which pleaded in bar to the entire application that some of the petitioners had conveyed the right of way, is bad on demurrer. The fact that some of the petitioners had conveyed the right of way is no bar to the right of those who had not done so, to have their damages assessed.

Same.—*Right of Way.—Agreement to Fence.—Answer.*—An answer to such a petition is bad which averred entry upon and occupancy of the right of way in controversy with the consent of the petitioner, and an agreement on the part of the petitioners to convey such right of way, in consideration of the railroad company's agreement to fence the same, and compliance by the railroad company on its part. The duty to fence the road was a duty imposed upon the railroad company by law, and a promise to perform that duty was no consideration for an agreement on the part of the petitioners.

From the Tippecanoe Circuit Court.

J. V. Kent, for appellants.

J. T. McHugh, for appellee.

Coffey, J.—This was a petition by the appellants for a writ to assess the damages occasioned by the construction of a railroad over their lands, under the provisions of section 905 to 912, R. S. 1881.

The appellee answered:

Second. Six years' statute of limitations.

Third. Fifteen years' statute of limitations.

Fourth. Conveyance of the right of way by part of the appellants.

Fifth. Entry upon and occupancy of the right of way in controversy with the consent of the appellants and an agreement on the part of the appellants to convey such right of way in consideration of appellee's agreement to fence the same, averring compliance by the appellee on its part.

The court overruled a demurrer to these several answers, and thereupon the appellants replied to the second and third paragraphs that there was an intervening life-estate on the land at the time the appellee and its predecessors entered, and that the period fixed by the statute of limitations had not elapsed since the termination of such life-estate. To this reply the court sustained a demurrer, and the appellee had judgment for costs.

The assignment of errors calls in question the rulings of the court in overruling a demurrer to the several answers above referred to, and in sustaining a demurrer to the reply filed by the appellants to second and third paragraphs of such answer.

This application was not barred by the six years' statute of limitations, and the court, therefore, erred in overruling the demurrer of the appellants to the second paragraph of the appellee's answer. *Shortle* v. *Louisville, etc., R. W. Co.*, 130 Ind. 505.

That there is a broad distinction between an application of the kind we are now considering and an ordinary action of trespass is almost too plain for argument.

At the termination of an action of trespass the title to the land is left where it was when the action was commenced.

In an action of trespass the owner does not recover the value of the land appropriated, for the reason that he still retains it.

In an action of this kind, where a writ issues to assess the damages, the title to the land appropriated is transferred to

the railroad company and the owner recovers its value. The distinction between the two classes of cases is fairly illustrated in the case of *McClinton* v. *Pittsburgh, etc., R. W. Co.*, 66 Pa. St. 404, in which the court said: "The petition, when properly used, is not for the recovery of past damages under an unlawful entry, but for compensation for a right to be invested in the company. Though the latter is often denominated damages, its subject is essentially different from the former. It is called damages only in the sense of an unliquidated demand, but in its nature it is the price of a purchased privilege."

The court did not err in overruling the demurrer to third paragraph of the answer. This proceeding is limited by the fifteen years' statute of limitations. There is no other statute by which it can be limited. *Shortle* v. *Louisville, etc., R. W. Co., supra.* Section 3953, R. S. 1881, does purport to be a statute of limitation, and does not, in our opinion, have any application to the question now under consideration.

The court erred, we think, in overruling a demurrer to the fourth paragraph of the answer. It is pleaded as a bar to the entire application. The fact that some of the appellants have conveyed the right of way is no bar to the right of those who have not done so to have their damages assessed.

An answer which is plead in bar of the whole action and bars only a part is bad on demurrer. *Pouder* v. *Tate*, 76 Ind. 1; *Falmouth, etc., T. P. Co.* v. *Shawhan*, 107 Ind. 47; *Reid* v. *Houston*, 55 Ind. 173.

The court erred also, we think, in overruling a demurrer to the fifth paragraph of the answer. The facts therein set forth fall far short of constituting an estoppel against the appellants. It furthermore appears upon the face of the answer that the promise of the appellants to convey the right of way was without consideration. The duty to fence its

road was a duty imposed upon the appellee by law, and a promise to perform that duty was no consideration for an agreement on the part of the appellants. *Ford* v. *Garner*, 15 Ind. 298; *Reynolds* v. *Nugent*, 25 Ind. 328; *Ritenour* v. *Mathews*, 42 Ind. 7; *Fensler* v. *Prather*, 43 Ind. 119; *Smith* v. *Boruff*, 75 Ind. 412.

The reply filed by the appellants was wholly insufficient to avoid the statute of limitations. The authorities cited by the appellants have no application here. They apply, ordinarily, to possessory actions. Under the facts disclosed by the pleadings in this case the appellants could not maintain an action of ejectment.

Section 287, R. S. 1881, provides that "A person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years." While section 909, under which this proceeding was instituted, provides that "Any person having an interest in any land which has been or may be taken for any such public work, may have the benefit of this writ upon his own application, as above provided, upon which like proceedings shall be had as in case of applications made by the corporation, company, or person prosecuting the work."

It will thus be seen that by express statutory provision the intervening life-estate in nowise interfered with the right of the appellants to the writ which they now seek. So far as we have been able to ascertain, the authorities agree that the remainder man is entitled to the remedy which the appellants in this case are invoking, and the intervening life estate is no barrier to the exercise of the right to have his damages assessed. *Burbridge* v. *New Albany, etc., R. R. Co.*, 9 Ind. 546; Pierce R. R., p. 185; *Toledo, etc., R. W. Co.* v. *Dunlap*, 5 Am. & Eng. R. Cases, 378, 389*n*; Lawson Rights, Rem. and Prac., section 3890.

In our opinion the court did not err in sustaining the demurrer to the reply filed by the appellants.

Judgment reversed, with directions to sustain the demurrer of the appellants to the second, fourth and fifth paragraphs of the answer of the appellee.

Filed April 21, 1892.

No. 16,206.

ROBY, TRUSTEE, *v.* SMITH ET AL.

CONSTITUTIONAL LAW.—*Statute Requiring Trustees to be Residents of State Invalid.*—The statute (section 2988, R. S. 1881) requiring a trustee of any person, association or corporation to be a *bona fide* resident of the State of Indiana is unconstitutional, being in conflict with article 4, section 2, and the Fourteenth Amendment of the Constitution of the United States.

From the Steuben Circuit Court.

D. R. Best, *E. A. Bratton* and *W. F. Elliott*, for appellant.

J. A. Woodhull and *W. A. Brown*, for appellees.

MILLER, J.—This action was brought by the appellant, Frank S. Roby, trustee, to foreclose a mortgage on real estate situate in Steuben county, in this State.

In addition to the usual averments, the complaint shows that in September, 1889, The George T. Smith Middlings Purifier Company was the holder of four promissory notes signed by the Steuben Mill Company; that on or about the 1st day of October, 1889, the Purifier Company sold and assigned these notes to certain banks in the State of Michigan, the notes being endorsed by George T. Smith; that at the time of the sale and assignment of these notes the company, by its officers, stated and represented that the notes were secured by a first mortgage on certain mill property situated in Steuben county; that, at that time, the notes were not in fact secured by mortgage, but subsequently, on the 24th day of January, 1890, the said George T. Smith, who held the title

to the mill property, executed the mortgage in suit to Dwight S. Smith, as trustee, to secure the payment of the above mentioned notes; that at the time of the execution of the mortgage, Dwight S. Smith, therein named as trustee, George T. Smith, The George T. Smith Middlings Purifier Co., and all of the holders of the several notes secured by the mortgage, were non-residents of the State of Indiana, and the mortgage was executed in the State of Michigan, where they resided; that said Dwight S. Smith, as trustee, brought suit in the Steuben Circuit Court in March, 1890, to foreclose said mortgage, to which action the defendants therein appeared, and pleaded as an abatement of the action the fact that said Dwight S. Smith was, at the time of the execution of the mortgage, and still remained, a non-resident of the State of Indiana; that such proceedings were had upon the issues thus joined in the action as that the action abated; that said Dwight S. Smith is one of the stockholders of one of the banks who held one of the notes, and as such, is one of the beneficiaries of that instrument; that at the February term, 1891, of this court, Dwight S. Smith, the trustee, and the holders and owners of the notes secured by the mortgage, joined in a petition to this court for the appointment of a resident of the State of Indiana to act as a trustee to foreclose said mortgage; and that the court did, upon their petition, duly and regularly appoint this plaintiff, who is a resident of the State of Indiana, as trustee to foreclose said mortgage; that the plaintiff, as such trustee, at the instance and request, and for the use and benefit of all the holders of said notes, brings this action of foreclosure.

Demurrers, filed by each of the defendants, were sustained, to the complaint, and final judgment rendered on demurrer for the defendants.

The ruling upon the demurrer is the only question in the record.

The correctness of this ruling depends upon the validity and construction to be given to section 2988, R. S. 1881, in

force since May 31, 1879, which is as follows: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills) for any purpose whatever, who shall not be, at the time, a *bona fide* resident of the State of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the State, to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the State, then his rights, powers and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the act to which this is supplemental."

The constitutionality of this act is vigorously assailed by counsel for the appellant.

It is claimed that this act limits the constitutional rights of citizens of this State to select and appoint their own agents in the control and management of their own property, which is one of the inherent and inalienable rights of a citizen.

The facts of this case do not require us to enter into a discussion of this question.

The contract was entered into in the State of Michigan, by and between citizens of that State, to secure an indebtedness expressly payable in that State. It was to all intents and purposes a Michigan contract, except that the land being situate within this State, the mortgage, which is a qualified conveyance of real estate, is subject to the law of the State, so far as it affects the validity and enforcement of the lien. 1 Jones Mortg., section 662.

The rights of the citizens of this State to appoint non-resident trustees are not involved in this case.

Another question involved in the consideration of the constitutionality of the act under consideration may be excluded from the present discussion: that is the right of a non-resident trustee to prosecute in the courts of this State actions affecting the trust property.

We infer from the last clause of the section that it was the

purpose of the Legislature in enacting this statute to compel trustees to reside within the State in order to bring them within the process and subject to the control of the State courts.

In the present action the suit was brought by a resident trustee who owed his appointment to the order of the court, and not to the act of the parties.

We have remaining for determination the question, does, or does not, this act, as applied to the facts disclosed in the record, impair the privileges and immunities of citizens of another State or of the United States, as guaranteed in article 4, section 2, and the Fourteenth Amendment of the Constitution of the United States?

The constitutionality of this act has never been passed upon by this court, although the question seems more than once to have been in the mind of the court.

In holding that this act did not apply to the trustees appointed prior to the passage of the act, the court, in *Thompson* v. *Edwards*, 85 Ind. 414, said: "Waiving all discussion as to the power of the Legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest," etc.

In *Bryant* v. *Richardson*, 126 Ind. 145 (153), it is said that it "may well be doubted" if that portion of this statute which applies to natural persons and seeks to prohibit them from naming a person who is a non-resident of the State to act as a trustee for them is valid.

In *Farmers', etc., Co.* v. *Chicago, etc., R. W. Co.*, 27 Fed. R. 146, GRESHAM, J., said of this statute: "It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of Indiana, real or personal property within the State. This is a plain discrimination against the

residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States can not be denied the right to take and hold absolutely real or personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship. Section 2, of article 4, of the Constitution of the United States declares that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.' 'Attempt will not be made,' say the Supreme Court of the United States, in *Ward* v. *Maryland*, 12 Wall. 418, 'to define the words "privileges and immunities," or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; *to take and hold real estate.*'"

In that case one of the trustees, at the time of the creation of the trust, was a resident of the State. The resident trustee having died, the action was prosecuted by the surviving and non-resident trustee. The fact that the language above cited was not strictly essential to the determination of the case before the court may impair the force of the decision as

an authority, but it does not detract from the potency of its reasoning.

Reluctant as we are to hold a statute regularly enacted by the General Assembly unconstitutional, we can not avoid the conclusion that the act under consideration is in conflict with those provisions of the Constitution of the United States which guarantee to the citizens of each State, and of the United States, all the privileges and immunities of citizens of the several States.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

ELLIOTT, C. J., did not sit, and took no part in the decision of this case.

Filed April 23, 1892.

No. 15,039.

131	347
144	434
131	347
150	559
151	657

FOWLER v. WALLACE.

SLANDER AND LIBEL.—*Evidence of Defendant's Pecuniary Condition.*—In actions for slander, evidence of the defendant's pecuniary condition is competent.

SAME.—In an action of slander or libel, for imputing the commission of a crime to the plaintiff, a plea of justification must be proved beyond a reasonable doubt.

PRACTICE.—*Repeating Instructions Unnecessarily.*—It is error for the court to repeat in the charge rules of law, though applicable to the case, in such form as to give to them such an undue prominence that they may mislead the jury.

SAME.—*Contradictory Instructions.*—The court can not by contradictory instructions leave to the jury the duty of determining which of the two lines of instructions shall be followed, or what rule of law shall control the case.

SAME.—*Objections to Evidence.*—Specific objections to evidence must be stated to the trial court, and the objections as stated must be brought into the record on appeal.

CRIMINAL LAW.—*Embezzlement.*—*Intent to Defraud.*—*Evil Intent.*—To constitute the crime of embezzlement of money there must be, either at the time of receiving the money or at some subsequent time, some element of fraud or evil intention; for if there be no fraudulent purpose or evil intention there is no crime.

SAME.—*Intention to Return Money Taken.*—If there is a wilful and known wrongful taking, use or appropriation of the employer's money by an agent, the criminality of the act is not removed by the intention to make restitution of the money.

SAME.—*No Intent to Deprive Owner of Money or His Property.*—It is not essential to the crime of embezzlement that at the time the wrongful act is perpetrated there should be an intention to deprive the owner of his property.

From the Greene Circuit Court.

E. H. C. Cavins, *A. G. Cavins*, *J. H. Jordan*, *O. Matthews*, *W. R. Harrison* and *I. H. Fowler*, for appellant.

D. E. Beem and *W. Hickam*, for appellee.

ELLIOTT, C. J.—This action was prosecuted by the appellee against the appellant to recover damages for slanderous words uttered and published by the latter of the former.

The questions requiring consideration arise on the ruling denying a new trial.

One of the questions argued by counsel relates to the introduction of an affidavit made by the appellant for a change of venue. The only objection stated in the introduction of the affidavit was that "it is inadmissible." This statement was insufficient. It is settled beyond controversy that specific objections to evidence must be stated, and the objections as stated must be brought into the record on appeal. *Ohio, etc., Co.* v. *Walker*, 113 Ind. 196, and cases cited. *Bingham* v. *Walk*, 128 Ind. 164 (173).

In actions for slander, evidence of the defendant's pecuniary condition is competent.

The court instructed the jury that the appellant must

prove his answer of justification beyond a reasonable doubt. It is with reluctance and regret that we yield to the decisions upon this point, and sustain the instruction. It has been so often and so emphatically asserted that the question is so firmly settled that the rule can only be changed by legislation, that we feel bound to adhere to the doctrine of our cases. We are satisfied that the rule grew out of a misconception of principle, and we should be glad to escape from it; and if we were not impelled by duty we should decline to give it our adherence. The decisions are numerous, and their assertions unqualified and strong. *Hutts* v. *Hutts*, 62 Ind. 214; *Wilson* v. *Barnett*, 45 Ind. 163; *Tucker* v. *Call*, 45 Ind. 31; *Lanter* v. *McEwen*, 8 Blackf. 495; *Wonderly* v. *Nokes*, 8 Blackf. 589; *Landis* v. *Shanklin*, 1 Ind. 92; *Gants* v. *Vinard*, 1 Ind. 476; *Shoulty* v. *Miller*, 1 Ind. 544; *Swails* v. *Butcher*, 2 Ind. 84; *Tull* v. *David*, 27 Ind. 377. In the latest cases touching the question the court recognizes the existence of the rule in libel and slander cases, speaks of the fruitless attempt to secure its overthrow, and declares that it can not be extended to other classes of cases than actions for libel or slander. *Hale* v. *Matthews*, 118 Ind. 527. The later decisions upon the subject, as we think, recognize the rule as applying to slander and libel cases, but deny its application to other cases. It would certainly do much less evil to leave a change to be made by legislation, inasmuch as such a change, not being retroactive, would not affect pending cases and permit successful appeals or bills of review, while a change by judicial decision would open the way to litigation by appeal, and by proceedings for review in cases wherein judgments have been rendered, but against which the statute that limits the time for appealing or filing bills of review has not operated, we are satisfied at all events, that it is our duty to give the rule *stare decisis* effect, much as we may favor the unification of rules of evidence.

The court repeated, in seven, or more, instructions, the statement that the appellant must prove the material facts

in his answers of justification, beyond a reasonable doubt. In some of the instructions very strong and emphatic language was employed. Thus, in one of the instructions it is said: "To sustain the pleas of justification relied upon by the defendant in this case, in so far as the same alleges the truth of the charges, it is necessary that all of the material allegations of the same shall be established to the satisfaction of the jury beyond a reasonable doubt, and for the purpose of determining that question you may properly regard the the plaintiff as placed upon trial under an indictment by the grand jury of the county upon the charge of criminal embezzlement." In another instruction it is said: "The plaintiff occupies the same position, so far as the degree of proof is concerned, under the answers of justification, upon the grounds of the truth of the charge, as if he were on trial upon an indictment for the embezzlement of the money of the bank, for whom he was acting as cashier, and I therefore instruct you, as a matter of law, that where a plea of justification in an action for slander charges the plaintiff with the crime of embezzlement, the defendant must prove the guilt of the plaintiff beyond a reasonable doubt." We all agree that these instructions went farther than the law warrants in repeatedly asserting that the position occupied by the plaintiff was the same as if he had been on trial upon an indictment; at all events we are clear that the iteration and reiteration of the statement so emphatically made, that the plea of justification must be proved beyond a reasonable doubt, gave the statement undue prominence, to the prejudice of the appellant. The repetition of a statement so emphatically and strongly made is very likely to mislead a jury by creating the impression that the judge intends that the statement made by him shall control and be acted upon to the exclusion of other rules. In *Powell* v. *Messer*, 18 Texas, 401, it was said: "Where the judge has embodied in his charge rules of law applicable to the case, in such form and connection as to give to each no more than its due relative prom-

inence, to repeat portions of the charge in the form of distinct and independent propositions, may not unfrequently have the effect to give to the principles thus enunciated an undue prominence and importance in the minds of the jury, and thus to mislead them in the application of the law to the evidence. It is the manifest duty of the court to guard against such a consequence." It is probably true that there are cases where the rule stated should not apply, but the case before us is a close one upon the evidence, and we are unable to escape the conclusion that the trial court by so often repeating the doctrine so broadly and strongly stated imposed a greater burden upon the appellant than the law requires him to bear.

One of the instructions given by the court reads thus: "In determining the question as to whether or not the crime of embezzlement has been committed, you should bear in mind that there is a wide difference between a felonious taking, purloining, secreting or appropriating the property or money of the bank and the mere negligent or careless loaning or use of the same in the course of his (plaintiff's) duties as cashier. In the case of a criminal taking, or permitting to be taken by another, there is existing in the mind of the criminal the felonious intent to deprive the owner of the property without compensation. In the other case, while he might incur a civil liability to the bank through his lack of faithfulness and strict attention to his duty as such cashier, there is yet lacking that felonious intent to deprive the owner of the property necessary to the commission of the crime of embezzlement." In another instruction the court declared that the defendant must prove, among other things, this fact: "That Wallace, while acting as such cashier, did unlawfully, feloniously, and for the wrongful purpose of depriving said bank of the same, take, purloin, secrete, or in some way appropriate to his own use, or to the use of others, or with such felonious knowledge, permit some other person to take, purloin, secrete, or in some way appropriate to his or her own

use, or to the use of another, the money of the bank controlled by him as cashier for the purpose of depriving the bank of the same."

These instructions assert that the purpose or intent of the cashier to deprive the bank of its money must have existed at the time of appropriating, purloining or secreting the money. They impliedly assume that there may be a wrongful appropriation of the money of the bank, and yet be no embezzlement, unless at the time of appropriating, purloining or secreting the money the cashier intended to deprive the bank of it without compensation.

The instructions are certainly misleading in asserting, as they do, that money may be purloined or secreted by a bank cashier, and there be no crime unless the intent to eventually deprive the owner of its money exists in the mind of the purloiner. We suppose it clear that where a cashier purloins and secretes the money of the bank, there is guilt, no matter what may be his intention as to ultimately depriving the bank of its property. He can not wrongfully purloin and secrete money without becoming, *prima facie*, at least, an embezzler. But we think that the instructions would have been erroneous if the words purloin and secrete had not been employed. We regard the instructions as erroneous because they convey the meaning that, although there may be a wrongful appropriation or conversion of the money of a bank by its cashier, there is no crime unless there was an intention to deprive the owner of the money wrongfully appropriated or converted.

The wrongful or negligent violation of a rule of a bank by a cashier in lending money to himself or to others does not necessarily make him an embezzler, nor does the fact that he may not be able to account for all money that may come into his hands make him guilty, *per se*, of embezzlement. There must, in order to constitute the crime, be, either at the time of receiving the money or at some subsequent time, some element of fraud or evil intention. If there

is no fraudulent purpose or evil intention, there is no crime. But in going thus far we go to the utmost verge of the doctrine asserted by the cases most favorable to the appellee. If there is fraud in taking, appropriating, or using the money, there is a criminal act, and so there is where there is fraud in failing to account for the money taken or used by the cashier. The rule, as we have stated it, does not go far enough to rescue the instructions from condemnation, for embezzlement may exist without any intention existing in the mind of a bank cashier at the time he takes, obtains or uses money of his employer to deprive the employer of it without compensation. A cashier who takes the money of the bank to wager on a game of chance is guilty of embezzlement although at the time he may intend to replace it, and may believe that he is able to do so. So, too, a bank cashier, who, in wilful violation of the rules of the bank, takes its money and uses it as his own, or uses it in conjunction with others, in speculating in grain, may be guilty of a crime, although he may intend to restore the money, and believes that he can do so. If there is a wilful and known wrongful taking, use or appropriation of the employer's money by an agent, the criminality of the act is not removed by the intention to make restitution. The intention to restore or replace does not make a wrongful and intentional purloining, secretion or appropriation of the money of another any the less an embezzlement, nor is it essential to the existence of the offence that at the time the wrongful act is perpetrated there should be an intention to deprive the owner of his property.

Our statute does not expressly make a felonious intent to deprive the owner of his property an element of the offence. It provides that any person in the employ of another who shall, "while in such employment, take, purloin, secrete, or in any way whatever appropriate to his or her own use, or to the use of others, * * * any money, coin, bills, notes, credits, choses in action, or other property or article of value,

belonging to or deposited with, or held by such person or persons, corporation," shall be deemed guilty of embezzlement. Section 1944, R. S. 1881. If we adhere to the words of the statute we should be compelled to hold that the taking or appropriation of itself constitutes the crime, for there is no reference to intention or design. But we think that the statute should not be so strictly construed against one accused of crime. We hold that there must be some element of moral wrong or there is no crime, but we can not hold that there must be both a wrong and a felonious intention at the time of taking or appropriating the employer's money to deprive him of it.

It has been held under statutes less comprehensive than ours that the felonious intent need not exist at the time the money is taken. If formed at any time it gives a criminal character to the act. *State* v. *Findley*, 101 Mo. 217. But, waiving the objection that the instructions unduly limit the time of forming the evil intention, we will refer to the authorities upon the subject of the intention to make restoration.

The authorities are well agreed upon the proposition that the intention to restore, repay or replace money or property wrongfully and unlawfully appropriated does not take from the act its criminal character. In the case of *Commonwealth* v. *Tenney*, 97 Mass. 50, 59, it was said: "Intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, can not do away with the criminal nature of the transaction. A guilty intent is necessarily inferred from the commission of such an act, the inevitable effect of which is to deprive the true owner of his property, and appropriate to the defendant's own use. Perhaps, in the majority of cases, the party who violates his trust in such a manner, does not expect that ultimate loss shall fall upon the person whose property he misuses. But no hope or expectation of replacing the funds abstracted can be admitted as an excuse before the law. The forger who means to take

up the forged paper; the thief who contemplates making eventual restitution, and the man who embezzles money, or bonds, with the design of restoring them all, fall under like condemnation in courts of justice, and wherever the rules of sound morality are respected." It is true that in the case from which we have quoted the act constituting the embezzlement was one clearly indicating an evil intention; but the rule stated is, nevertheless, a general one, and is asserted in other cases. In *Commonwealth* v. *Tuckerman*, 10 Gray, 173, 204, the question is fully examined, and the court, speaking of an intent to replace or restore money, said: "The result can not be affected by the consideration, if it be admitted to be well founded, that the defendant at the time of taking and converting the money to his own use, intended to restore it to the owners before his appropriation of it should become known to them, and believed that he should be able to do so, and had in his possession property to the full amount of the money which was taken."

The general doctrine was thus declared in *State* v. *Leicham*, 41 Wis. 565 (580): "Neither does the fact (if it be a fact) that the defendant believed, when he converted the seeders to his own use, that he would be able to pay the owners for them when required to account for them, and intended to do so, remove from the act of conversion its fraudulent and criminal character. The fraud and crime inhere in the act and were not eliminated therefrom by any mere mental process, however amiable or virtuous it may have been." Some of the cases go much further than those to which we have referred. *State* v. *Pratt* (Mo.), 11 S. W. R. 977; *Hemingway* v. *State* (Miss.), 8 So. R. 317; *Commonwealth* v. *Pratt*, 137 Mass. 98.

It is probably true that the instructions upon this point given at the request of the appellant contradict, in some particulars, those we have considered, but, granting that there is such a contradiction, nevertheless, the error in giving those first named is not cured. It is an elementary prin-

ciple of procedure that the court can not by contradictory instructions leave to the jury the duty of determining which of the two lines of instructions shall be followed, or what rule of law shall control the case. The law must come from the court, and be so declared that the jury can follow it without confusion.

The case is very far from being one in which we can say that the verdict is so clearly right upon the evidence that errors in instructions may be disregarded.

Judgment reversed.

Filed April 23, 1892.

DISSENTING OPINION.

OLDS, J.—I concur in the opinion of the majority of the court in all except the sustaining of the instruction given by the court that the appellant must prove his answer of justification beyond a reasonable doubt, and adhering to the former decisions of this court holding such a rule. I agree with the statement in the opinion "that the rule grew out of a misconception of principle," but I can not give my assent to the fact that it is too firmly fixed as the law of this State that it can only be changed by legislation. If this rule had been established and uniformly adhered to by an unbroken line of decisions in this State, being erroneous and contrary to an almost unbroken and unanimous line of decisions of the other States of the Union, it would seem to me that it is the duty of this court to correct the error and adopt the proper rule, since it affects only a rule of evidence applicable to cases triable in the future, and affects no property rights; but I maintain that the decisions of this court holding that, in actions for slander, the defendant is required to prove his answer of justification beyond a reasonable doubt is contrary to the law of this State, as declared by numerous decisions of this court, and that the decisions holding such a rule have, in effect, been overruled by other decisions holding the contrary.

It is the well-settled law of this State that in all civil actions a preponderance of the evidence is all that is necessary to establish the affirmative of an issue. An action of slander is a civil action, and to hold that an answer of justification in such a case must be proven by evidence beyond a reasonable doubt is in conflict with and contrary to rules of evidence governing in the trial of all other civil actions, and if such a conflict exists then it is the duty of this court to adhere to one general rule of evidence in all civil actions of like character, and to overrule any decisions which may be in conflict with such general rule.

The rule requiring a plea of justification to be proven beyond a reasonable doubt was adopted in England upon the trial of a plea of justification of a charge which imputed a felony, for the reason that if the defendant proved the plea, the plaintiff was subjected to be put upon trial for the felony proved, without the intervention of a grand jury, the verdict in such a case being equivalent to an indictment of the plaintiff.

There never was any reason for the application of the rule in this State or in this country, and under the decisions as they now exist in this State, as asserted in the majority opinion, the rule is adopted in one class of cases only, that of libel and slander, while as to all other classes of civil cases, where the truth of a charge of felony is alleged, the rule is not applied, and the plea is supported by a mere preponderance of evidence, while if the truth of slanderous words spoken is pleaded, the plea must be supported by proof beyond reasonable doubt.

In the case of *Continental Ins. Co.* v. *Jachnichen*, 110 Ind. 59, the appellee brought suit against the appellant upon a policy of insurance for the value of a barn and contents covered by the policy, and which was alleged to have been destroyed by a fire of unknown origin. The company answered that the assured had himself purposely burned the property with the intent to defraud the insurance company, and in that

case it was held that such answer was only required to be proven by a preponderance of the evidence.

In the case of *Hale* v. *Matthews*, 118 Ind. 527, the complaint averred that on a certain day appellee, Matthews, was the owner of a large quantity of lumber of the value of $925; that appellant, Hale, on said day, did then and there unlawfully, purposely and wilfully set fire to, burn and destroy all of said lumber, to the damage of Matthews in the sum of $925. The court charged the jury that the appellee, Matthews, was entitled to recover if he proved the averments of his complaint by a preponderance of the evidence, and the appellant contended that the appellee was not entitled to recover unless the averments of the complaint were proven beyond a reasonable doubt. The complaint charged a felony, and this court held that it was only necessary to prove its allegation by a preponderance of the evidence. The rule if applicable in civil cases applies to all pleadings alleging the commission of a felony, but this court has divided the rule, and applies it in one class of cases, to which it was applied in England, and refuses to apply it in another.

If the rule is now applicable in this State in cases of libel and slander, then one may bring suit and charge another with the crime of arson in burning his property, and recover its value if he establish the averments of his complaint by a preponderance of the evidence; and if the defendant sue him for slander for speaking the words charging him with arson, to avoid damages he must aver and prove beyond a reasonable doubt that he committed arson in burning the property for which he has in another suit recovered the value upon a preponderance of the evidence. The decisions are so contradictory, and, in my opinion, enunciate such an anomalous and absurd rule, if they are both to be regarded as the law, that it seems to me, in justice to this court and to litigants, one rule or the other should be abandoned and overruled if such has not already been the effect of our decisions.

In the case of *Continental Ins. Co.* v. *Jachnichen*, *supra*,

the court said: "Leaving the subject, so far as it relates to cases of slander and libel, for further examination, when such a case arises, it is only proper to add here, that the current of modern authority tends strongly in the direction indicated by the Supreme Court of Maine, in *Ellis* v. *Buzzell, supra;*" which decision of the Supreme Court of Maine limited the rule requiring proof beyond reasonable doubt to criminal cases, and held that only a preponderance was required in any civil case.

I regard the decision of the court in *Continental Ins. Co.* v. *Jachnichen, supra,* as abrogating the rule so far as all civil cases are concerned, except libel and slander, and in effect announcing that it would be abrogated in that class of cases when the question came before it for decision.

In the case of *Reynolds* v. *State, ex rel.*, 115 Ind. 421, the court, in a prosecution for bastardy wherein a defendant may be imprisoned if he fail to pay or replevy the judgment, held that a preponderance of the evidence is all that is necessary to establish the case against the defendant. And in that case the court says: "If any other authority were necessary it will be found in the late case of *Continental Ins. Co.* v. *Jachnichen,* 110 Ind. 59, where, after a thorough examination of the whole question, and a review of numerous cases and authorities, it was held that in all civil actions, a preponderance of the evidence only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be." This enunciates the correct rule, which is in accordance with the almost unanimous current of modern authorities, and holds that only a preponderance of the evidence is necessary to establish the affirmative of any issue joined in a civil case. These decisions, the one in 110 Ind. 59, and the other in 115 Ind. 421, are later utterances of this court than any holding the rule adhered to by the majority of the court, and are directly in opposition to the others, and in effect overrule them, and the decisions holding, as in the case of *Hale* v. *Matthews, supra,* that the rule is not applicable in cases other than libel

and slander, are also in direct conflict with those holding that the rule is applicable in cases of libel and slander, for the rule, as a rule, applies to pleadings alleging the truth of a felony. The following authorities, among others, are in harmony with the views I have expressed: *Matthews* v. *Huntley*, 9 N. H. 146; *Woddrop* v. *Thacher*, 116 Pa. St. 340; *Ellis* v. *Buzzell*, 60 Maine, 209; *Elliott* v. *Van Buren*, 33 Mich. 49; *Blaeser* v. *Milwaukee, etc., Ins. Co.*, 37 Wis. 31; *Kincade* v. *Bradshaw*, 3 Hawks N. C. 63; *Marshall* v. *Thames, etc., Ins. Co.*, 43 Mo. 586; *Jones* v. *Greaves*, 26 Ohio St. 2; *Riley* v. *Norton*, 65 Iowa, 306 (10 Am. Law Rev. 642); *Schmidt* v. *New York Ins. Co.*, 1 Gray, 529; *London* v. *Parmele*, 15 Gray, 416; *Rothschilds* v. *American, etc., Ins. Co.*, 62 Mo. 356; *Washington, etc., Ins. Co.* v. *Wilson*, 7 Wis. 169; *Scott* v. *Home Ins. Co.*, 1 Dillon, 105; *Vaughton* v. *London, etc., R. W. Co.*, 9 Ex. 93; note to 2 Greenleaf Ev., section 408; 2 Whar. Ev., section 1246; *Edwards* v. *Knapp*, 97 Mo. 432; *Davis* v. *Rome, etc., R. R. Co.*, 56 Hun, 372; *People* v. *Evening News*, 51 Mich. 11; *People* v. *Briggs*, 114 N. Y. 66; *Bell* v. *McGinness*, 40 Ohio St. 204; *Davis* v. *Rome, etc., R. R. Co.*, *supra*.

For the reasons given I am unable to concur in so much of the opinion as holds that an answer in justification must be proven beyond a reasonable doubt to be available as a defence in an action for libel or slander.

McBride, J.—I concur in the dissenting opinion.

Filed April 23, 1892.

No. 15,582.

131 361
131 600
182 224
131 361
149 2

EWING *v.* LUTZ ET AL.

PLEADING.—*Title to Real Estate.—Deed.—Complaint.*—When the plaintiff asserts title to real estate, and bases his claim upon a certain deed, and the record shows that a deed regular in form, clear in its terms, and apparently founded upon a valuable consideration, was executed by the grantor to the grantee, and there are no facts tending to show fraud or mistake, it is error to sustain a demurrer to the complaint.

From the Wabash Circuit Court.

F. Ullman, O. H. Bogue, J. B. Walker, R. E. Pendarvis, for appellant.

M. H. Kidd and *J. M. Hunter,* for appellees.

ELLIOTT, C. J.—The appellant asserts title to real estate, and bases his claim upon a deed executed by George W. Ewing, junior, to George W. Ewing, senior. The deed is the same as that examined and construed in the cases of *Ewing* v. *Jones,* 130 Ind. 247; *Ewing* v. *Lemcke,* 130 Ind. 600; *Ewing* v. *Torian,* 130 Ind. 600, and *Ewing* v. *Carson,* 130 Ind. 597. The appellees demurred to the complaint, and their demurrer was sustained, so that the only question presented to us is as to the effect of the deed upon which appellant's claim of title is founded. There are no extrinsic facts alleged, and we are not required to do more than declare what is the *prima facie* meaning of the deed, and what is its legal effect, when considered independently of extrinsic facts. All we know from this record is that a deed, regular in form, clear in its terms, and apparently founded upon a valuable consideration, was executed by the grantor to the grantee, for there are no facts tending to show fraud or mistake. In the cases referred to we simply gave judgment upon the deed, and we here do no more than decide upon the deed itself. Whether it may be impeached for fraud or mistake, or what facts must be shown to justify its overthrow, are questions with which we have here no con-

cern, and upon which we give no opinion. We have had no brief from the appellees. The cases to which we have referred, and the authorities to which they refer, leave no room to doubt that the court below erred in holding the complaint insufficient.

Judgment reversed.

Filed April 23, 1892.

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131 362
146 634

No. 15,647.

BONNEL v. SHIRLEY ET AL.

PRACTICE.—*Supreme Court.—Insufficiency of Brief.*—Where a brief filed in the Supreme Court contains nothing but a bare assertion of errors, no question is presented thereby for the consideration of the court.

From the Carroll Circuit Court.

C. S. Wesner and *O. D. Wesner*, for appellants.

McBRIDE, J.—The brief filed by counsel for the appellant contains nothing whatever by way of argument, or citation of authority. Nor is there even a suggestion of any reason, or ground, for holding the action of the court below erroneous.

We find nothing in it but a bare assertion of error. Such a brief presents no question for our consideration. *Harrison* v. *Hedges*, 60 Ind. 266; *Bray* v. *Franklin Life Ins. Co.*, 68 Ind. 6; *Landwerlen* v. *Wheeler*, 106 Ind. 523, and many other cases.

Judgment affirmed.

Filed April 26, 1892.

No. 15,100.

The New Albany Forge and Rolling Mill *v.* Cooper, by Next Friend.

Master and Servant.—*Action for Damages.—Injury of Infant.—Contributory Negligence.—Danger Known to Defendant.—Complaint.*—In an action by a minor, by his next friend, to recover damages occasioned by a personal injury, the complaint alleged that the appellee, who was an infant, without knowledge or experience of the dangerous properties of hot slag or cinder, was employed by the appellant to carry and wheel away from a furnace, and dump upon adjacent ground, a part of which was covered with water, hot slag; that the appellant, with knowledge that such slag was liable to explode and injure the appellee, if it came in contact with damp earth or water, negligently failed to instruct the appellee as to his duties, or to warn him of the danger of handling such slag, or to give him any instructions which would enable him to safely perform his duties; that the appellee was injured by the hot slag coming in contact with a small quantity of water which had collected on the surface of the ground at the point where he was directed to deposit the slag.

Held, that from the allegations concerning the ignorance of the appellee there was nothing in the complaint from which it could be averred that he was guilty of negligence.

Held, also, that as the place where the appellee was directed to deposit the hot slag is alleged to have been covered by water, the presumption is that such fact was known to the appellant.

Same.—*Existence of Dangers.—Duty of Master to Warn Infant.*—Where a master takes an infant into his service, the law imposes upon him the duty of explaining to him fully the hazard and dangers connected with the business, and of instructing him how to avoid them.

Same.—*Hiring by Independent Contractor.—Effect of.*—The fact that the appellee was not independent of the appellant in so far as that it might require his discharge for failure to do his duty while at work, did not necessarily make him the servant of the appellant when he was employed by an independent contractor. To make him such there must have been a contract between him and the appellant, either express or implied.

Contract.—*Independent Contractor.—Negligence.*—Where one lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular standard when completed, he is not liable for the negligence of the party to whom the contract is left.

From the Floyd Circuit Court.

G. V. Howk and *A. Dowling*, for appellant.

C. L. Jewett, *H. E. Jewett* and *J. F. Marsh*, for appellee.

COFFEY, J.—This was an action by the appellee, a minor, by his next friend, against the appellant, to recover damages occasioned by a personal injury. The complaint alleges, in substance, that the appellee, who was an infant, without knowledge or experience of the dangerous properties of hot slag or cinder, was employed by the appellant, a corporation engaged in forging and rolling iron, to carry and wheel away from a furnace, and dump upon adjacent ground, a part of which was covered with water, hot slag and cinder; that the appellant, with knowledge that such slag and cinder were liable to explode and injure the appellee if they came in contact with damp earth or water, negligently failed to instruct the appellee as to his duties, or to warn him of the danger of handling such slag and cinder, or to give him any instructions which would enable him to safely perform his duties; that on the third day of his service, and while he was, by the direction of the appellant's foreman, engaged in wheeling away and dumping, at the place where he was directed to deposit the same, hot iron slag, it came in contact with a small quantity of water which had collected on the surface of the ground at that place, and at once exploded with force and violence, burning and wounding the appellee, and destroying his eyesight, etc.; that the appellee's injuries were caused solely by the negligence of the appellant, and without any fault or negligence on the part of the appellee.

A trial of the cause resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of errors calls in question the propriety of the ruling of the circuit court in overruling a demurrer to the complaint, and in overruling the appellant's motion for a new trial.

The objections urged to the complaint are, that it does not appear therefrom that the appellant knew or had the opportunity of knowing that there was, at or before the accident therein described occurred, any water or damp earth upon the dumping ground, and that it does appear from the allegations in the complaint that the appellee was guilty of contributory negligence.

Much of the argument against the sufficiency of this complaint is addressed to matters which could not arise except on motion to make the complaint more specific, and do not, therefore, arise upon demurrer.

We think the complaint states a cause of action. In view of its allegations in relation to the ignorance of the appellee, there is nothing in it from which it can be inferred that the appellee was guilty of negligence. As the place the appellee was directed by the appellant to dump the slag and cinder is alleged to have been covered by water, the presumption is that such fact was known to the appellant.

Judge Thompson, in his work on Negligence, vol. 2, p. 977–8, says: "The law imposes upon the master, when he takes an infant into his service, the duty of explaining to him fully the hazard and dangers connected with the business, and of instructing him how to avoid them. * * The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same situation as if he were an adult." So, in the case of *Thall* v. *Carnie*, 5 N. Y. Sup. 244, it was said: "When a master engages an inexperienced servant, especially if of tender years and presumed ignorance, and places him in a place of latent or obscure danger, it is the duty of the master to instruct the servant how to do the work, and at the same time be on his guard against the danger, and he is liable for injuries occasioned by failure to give such instructions." See, also,

Cleveland, etc., Co. v. *Corrigan*, 20 N. E. Rep. 466; *Gamble* v. *Hines*, 50 Hun, 604.

It was assigned as reasons for a new trial:

First. That the damages assessed were excessive.

Second. That the verdict of the jury was not supported or sustained by sufficient evidence.

Third. That the verdict was contrary to law.

Fourth. That the court erred in giving, in refusing to give, and in modifying instructions.

The first reason assigned is not argued, and for that reason is waived.

The evidence in the cause, as it comes to us, establishes the following facts: the appellant is the owner of a rolling mill in the city of New Albany, in which scrap-iron is heated and rolled into bars suitable for the market. It furnishes the furnaces, rollers, scrap-iron and fuel necessary to carry on the business. At the time of the accident in question the appellant had a contract with one Murphy, by the terms of which the appellant furnished to him the scrap-iron, properly assorted and arranged, to be put into the furnace to be heated to the proper temperature for squeezing and rolling. The appellant was also to furnish the necessary fuel and heat to heat the iron, and Murphy's contract required him to heat it properly, and deliver it at the squeezer, where it was squeezed and delivered to the rollers to be rolled into bars. By the terms of this contract Murphy received a stipulated price for each ton heated by him. In placing the iron in the furnace, taking it out, delivering it at the squeezer and removing the slag and cinder, Murphy required assistance. This assistance was hired and paid for by himself at such price as he and his helpers might agree upon. One of Murphy's regular helpers being ill, the appellee was hired by Murphy to take his place temporarily. On the third day of his employment he dumped some slag into a small pool of water, when an explosion took place, resulting in serious and permanent injuries to the appellee.

The evidence tends to show that when hot slag is dumped upon damp ground or into water it is liable to explode, and is very dangerous. Of this tendency the appellee, it is claimed, was ignorant, and was not informed of the fact either by the appellant or Murphy. He was, at the time of the accident, about nineteen years old. The appellant's business was under the control and management of a general superintendent, who managed the rolling mill and the forge works connected therewith, while the rolling mill was under the immediate control of a superintendent appointed for that purpose. It was part of the business of the superintendent of the rolling mill to see that those who had contracts for heating iron did a certain amount of work each day, and that it was properly done. He also had power to discharge such heaters, but had nothing to do with hiring their helpers, keeping their time or paying them.

At the proper time the appellant asked the court to give the jury the following instruction :

"The company had the right to make any contract or arrangement it saw fit for the management of any part of its business, and for the carrying on of any department of its work, and if it did make a contract with Andrew Murphy, or with any other person, to act as heater, and to heat its iron in its furnaces, giving to him control over that part of its machinery and business, and paying him therefor by the ton; and if under that arrangement Murphy hired his own men and paid their wages out of his own moneys; and if Murphy, in the course of his business under this contract hired the plaintiff, Cooper, and was to pay Cooper for his work, then Murphy was the master and employer of Cooper, and not the Forge and Rail Mill Company, and there should be a verdict for the defendant."

The court refused to give this instruction as asked, but modified the same by adding thereto the words, "And had control of his services independent of the company," and gave same as modified.

It is well settled that where one lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular standard when completed, he is not liable for the negligence of the party to whom the contract is let. *Vincennes Water Supply Co.* v. *White*, 124 Ind. 376; *Wabash, etc., R. W. Co.* v. *Farver*, 111 Ind. 195; *Ryan* v. *Curran*, 64 Ind. 345; Wharton Negligence, section 181; 2 Thompson Negligence, 892–899; *Blake* v. *Ferris*, 5 N. Y. 48; *Pack* v. *Mayor, etc.*, 8 N. Y. 222; *King* v. *New York Central R. R. Co.*, 66 N. Y. 181; *Town of Pierrepont* v. *Loveless*, 72 N.Y. 211.

In the case of *Wabash, etc., R. W. Co.* v. *Farver*, *supra*, Williams was employed to use his portable engine, at a given price *per diem*, to pump water, furnishing his own help. He was required, by the terms of his contract, to pump at such times as should be necessary to enable the employees of the railway company to prosecute certain work in which they were engaged. It was held that he was an independent contractor within the meaning of the rule above stated, and that the railway company was not responsible for his negligence.

Under the facts in this case we think Murphy was an independent contractor under the rule we are now considering, and for that reason the court erred in refusing to give the instruction asked by the appellant. The modification was, we think, well calculated to mislead the jury. While it is shown that the appellee was employed by Murphy, and that the appellant could not discharge him, there is evidence in the record tending to show that if, in the opinion of the immediate superintendent, he was not doing his duty as a helper, such superintendent had the power to discharge Murphy if he, upon request, refused to discharge the appellee.

Under the instruction as modified the jury might well have concluded that this fact would render the appellant liable for the negligence of Murphy in failing to inform the appellee of the danger attending the work of dumping slag.

The complaint proceeds upon the theory that the appellee was the employee of the appellant, and that the appellant had been guilty of negligence in failing to give him certain information and instructions, and if he is entitled to recover at all in this action it must be upon that theory. The fact that he was not independent of the appellant, in so far as that it might require his discharge for a failure to do his duty while at work in the mill, did not necessarily make him the servant of the appellant. To make him such there must have been a contract between him and the appellant, either express or implied. If he was the servant of the appellant, then the appellant was liable for his wages, whereas we have seen that he was employed by Murphy at an agreed price, and was to be paid by Murphy at his own expense. The instruction as modified may have led the jury to the conclusion that as the appellant could compel the discharge of the appellee, he was, for that reason alone, its servant in such a sense as to render it liable in this case.

We do not think the court erred in refusing to give instruction number eight, as asked, and in modifying the same as it was given.

For the error of the court in refusing to give instruction number four as asked by the appellant, and in giving the same as modified, the judgment of the circuit court must be reversed.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed Feb. 16, 1892; petition for a rehearing overruled April 22, 1892.

No. 13,979.

131 370
157 109
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THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY *v.* MITCHELL.

PUBLIC OFFICER.—*Right to make Contracts with Ministerial Officers.*—Officers controlling the affairs of a public corporation may contract with ministerial officers of the corporation, unless such contracts are prohibited by statute.

COUNTY COMMISSIONERS.—*Allowances by.*—Construing the acts of 1879 and 1883 together, concerning allowances by boards of county commissioners, the plain conclusion required is that where there is an "indispensable public necessity" there is authority of law for making a contract with a county officer.

SAME.—*Review of Decision.—How Effected.*—In order to review the decision of a board of county commissioners as to the existence of an "indispensable public necessity," there must be a pleading properly alleging facts showing that the finding of the existence of a public necessity was wrong.

SAME.—*Contract with Officer of County.—Validity of.*—Where a board of county commissioners contracted with the county clerk at a stipulated price (the record showing "an indispensable necessity" for so doing) to index and re-arrange certain papers and files in his office, he may recover against the county on the contract. The claim is not for extra compensation, nor for official services nor for added official duties, but solely and exclusively for compensation due under a special contract, which the board had the same right to make with the county clerk as with a private individual. *Board, etc.,* v. *Barnes,* 123 Ind. 403, and *Board, etc.,* v. *Johnson,* 127 Ind. 238, distinguished.

SAME.—*Practice.—Contract Spread of Record.—Admission Implying.*—Where the record contains an express admission that a contract was entered into between the parties as alleged in the complaint, the admission implies that there was a contract properly spread of record, and makes unavailing the objection that it is not shown that the contract was spread upon the record of the board of county commissioners as the statute requires.

From the Tippecanoe Circuit Court.

S. P. Baird, W. D. Wallace, F. S. Chase, J. B. Sherwood, J. B. Milner and *C. E. Lake,* for appellant.

G. O. Behm, A. O. Behm, J. R. Coffroth, F. Winter and *J. B. Elam,* for appellee.

ELLIOTT, C. J.—The appellee was at the time of the execution of the contract upon which this action is founded, clerk of Tippecanoe county. The contract was entered into on the 11th day of February, 1885. The special finding states that the contract was made at a special session of the board of commissioners, and that "it was entered of record." The contract is expressed in an order of the board which reads thus: "Whereas, an indispensable public necessity exists for indexing and re-arranging all the papers and files in the county clerk's office of the county of Tippecanoe, and the board believing that the interests of the county demand that said indexing be done: Now, therefore, it is ordered by the board that William C. Mitchell be and is hereby authorized and directed to index all papers on file in the clerk's office, except the papers filed in the superior court, and he is further directed to box said papers in boxes provided by the board of commissioners of this county, and he is also directed to procure indices for doing said work, and it is especially agreed by said board and said William C. Mitchell that said Mitchell shall have and receive for said work three cents for each and every entry in said indices made and papers rearranged in new file boxes." The appellee did the work required by the contract, and filed his claim with the board of commissioners.

The record contains an express admission that a contract was entered into between the parties as alleged in the complaint, and in the formal entry of the admission is this clause: "And in connection with said admission it is agreed and understood that should there be any formal variance between said copy in the complaint and the original contract as entered in the records of said commissioners, the same may be corrected at any time." This admission implies that there was a contract properly spread of record, and makes unavailing the point that it is not shown that the contract was spread upon the record as the statute requires.

The fact that the appellee was an officer of the county

does not of itself authorize the conclusion that the contract is voidable because opposed to public policy. It is quite well agreed that the officers controlling the affairs of a public corporation may contract with ministerial officers of the corporation, unless such contracts are prohibited by statute. *Evans* v. *City of Trenton*, 24 N. J. L. 764; *City of Detroit* v. *Redfield*, 19 Mich. 376; *Mayor, etc.*, v. *Muzzy*, 33 Mich. 61; *McBride* v. *City of Grand Rapids*, 47 Mich. 236; *United States* v. *Brindle*, 110 U. S. 688; *State, ex rel.*, v. *Hauser*, 63 Ind. 155. It is probably true that, in cases where fraud or corruption is alleged as a cause for avoiding a contract the official relations subsisting between officers of the same public corporation may be influential as a circumstance indicative of fraud, but of itself it does not vitiate a contract otherwise free from infirmity.

The statute provides that "The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, sheriff, assessor, or treasurer, either directly or indirectly." Section 5766, R. S. 1881. This provision recognizes by the clearest implication the powers of the board to make allowances in cases of "indispensable public necessity." The requirement that the board shall find that such a necessity exists, and shall enter upon its record a finding of that fact, implies that there are instances in which the power to make allowances to public officers may be exercised. If there were no such instances, the provision of the statute would be utterly meaningless. The provision is in harmony with the long established principles governing the subject of the powers of the board of county commissioners, and with the decisions asserting that the board of commissioners is, in law, the county. *Vanarsdall* v. *State, ex rel.*, 65 Ind. 176; *Crow* v. *Board, etc.*, 118 Ind. 51; *Board, etc.*, v. *Bunting*, 111 Ind. 143, and cases cited; *Shannon* v. *O'Boyle*, 51 Ind. 565; *Board, etc.*, v. *Saunders*, 17

Ind. 437; *State, ex rel.*, v. *Clark*, 4 Ind. 315. In the case last named it was said: "In legal contemplation the board of commissioners is the county." But the powers of the board of county commissioners are statutory, and it has such powers only as the statute expressly or impliedly confers. The statute from which we have quoted restricts the power of the board to make contracts with officers, for it must be considered in connection with the other statutes granting broader powers, but it does not entirely deprive it of power to make such contracts. It confines the power to make such contracts to cases where there is an "indispensable public necessity." Where there is no such necessity there is no power to contract with other county officers, but where there is such necessity the power exists.

Repeals by implication are not favored, and, where it can be done without doing violence to the language of the Legislature, an earlier and a later statute must be construed together and both given force. We think that there is no difficulty in applying this rule to the present case. The act of 1883 forbids allowances unless provided by law, and the act of 1879 directs that allowances may be made in cases of "indispensable public necessity." Construing, as we must, these statutes together, the plain conclusion required is, that where there is an "indispensable public necessity," there is authority of law for making a contract with a county officer. Of course, if there is the general power to contract there is, also, the incidental power to pay the agreed compensation.

The statute vesting in the board of commissioners the power to determine when an "indispensable public necessity" exists was complied with in this instance. There was a decision adjudging that such a necessity did exist, and that decision was duly entered of record. It is probably true that the decision is not conclusive. It is, as we are inclined to believe, subject to review. But it can not be reviewed unless it is attacked in the proper mode. *Nichols* v. *Howe*, 7 Ind. 506. There must be a pleading properly alleging

facts showing that the finding of the existence of a public necessity was wrong. There is no pleading in this case that does this, although there is an attempt to do so. But we think that if it should be conceded that the decision of the board may be reviewed, and that the answer attempting to show that the decision is wrong, still the record affirmatively shows that upon this point the finding is right on the merits.

If the appellee's claim is to be regarded as one for extra services as an officer, the appeal must be sustained. If the claim is for compensation for duties performed by him as clerk he can not recover. Or, again, if the order of the board is to be construed as an attempt to add new official duties and give compensation for their performance, the appellee must fail. The cases supporting the doctrine indicated are numerous, and we strictly adhere to them. *Board, etc.*, v. *Johnson*, 127 Ind. 238; *Board, etc.*, v. *Barnes*, 123 Ind. 403; *Williams* v. *Segur*, 106 Ind. 368; *Board, etc.*, v. *Gresham*, 101 Ind. 53; *Wright* v. *Board, etc.*, 98 Ind. 88, and cases cited.

The appellee's claim is founded upon a contract to perform work required by "indispensable public necessity." His whole right grows out of the contract. His claim is not for extra compensation, not for official services, nor for added official duties. The claim is solely and exclusively for compensation due under a contract. On that contract rests his claim. The board might certainly have made such a contract with a private individual, and if it could do this it may make such a contract with the clerk. There are, indeed, strong reasons why it is proper to make the contract with the clerk rather than with a stranger. There are instances in which in the strictest sense of the term there is an "indispensable public necessity" for making such a contract, as, for instance, where there is a removal caused by the destruction of a court-house, or by the construction of a new one.

As the right of the appellee rests entirely upon a special contract made by the board because of the demands of "an

indispensable public necessity," the case is not within the scope of the doctrine of the cases declaring that extra compensation can not be paid to county officers. That cases exist in which a valid contract may be made by the board of commissioners with a county officer has been adjudged. *Board, etc.,* v. *Weeks,* 130 Ind. 162; *Hoffman* v. *Board, etc.,* 96 Ind. 84; *Garrett* v. *Board, etc.,* 92 Ind. 518; *Boggs* v. *Caldwell County,* 28 Mo. 586. To the class of cases represented by those just named this case belongs, and not to the class of which *Board, etc.,* v. *Barnes, supra,* and *Board, etc.,* v. *Johnson, supra,* are types. There is a wide and clear difference between the two lines of decisions, and within the line established by the decisions in such cases as *Hoffman* v. *Board, etc., supra,* falls this case, inasmuch as there is a special contract made because the work for which it provides was demanded by an "indispensable public necessity."

We can not say from the evidence that the trial court erred in adjudging the amount of recovery.

Judgment affirmed.

Filed Feb. 24, 1892; petition for a rehearing overruled April 26, 1892.

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No. 15,690.

Adams v. The Ohio Falls Car Company.

INJUNCTION.—*Private Corporation.—Wrongful Use of Wharf by.—Common Council.*—Where a corporation for purely private purposes has entered upon a strip of land used for wharf purposes, and has begun the construction of a log-way and raised platform thereon, and threatens to use a steam engine in the prosecution of its business on said wharf, one who lives in the immediate vicinity of the wharf may enjoin such a use of the wharf, his complaint showing injury to the use and enjoyment of his dwelling-house therefrom, and consequent depreciation in its value, and the interference of its comfortable enjoyment by dust, smoke and offensive odors. The common council of a city can not authorize such an obstruction of the wharf.

SAME.—*Interference with Comfortable Enjoyment of Dwelling.*—It is not necessary to a right of action by the plaintiff that his dwelling-house will be injured by the proposed use of the wharf, but if its comfortable enjoyment will be essentially interfered with by dust, smoke and offensive odors, relief by injunction will be awarded.

SAME.—*Right in Common with Public.—Deprivation of.*—The plaintiff in such a case has no right of action on account of the deprivation of the right which he in common with the general public has to use and drive over that part of the wharf occupied by the obstruction.

SAME.—*Injury as Tax-Payer.—When Complaint Fails to Show.*—Where it does not appear in the complaint that plaintiff's taxation would be increased either directly or indirectly by the alleged wrongful use and obstruction of the wharf, there is nothing to show that he will suffer injury as a taxpayer on that account.

From the Clark Circuit Court.

J. H. Stotsenburg, *E. B. Stotsenburg* and *J. K. Marsh*, for appellant.

M. Z. Stannard, for appellee.

MILLER, J.—The appellant brought this action to enjoin the appellee from making use of a portion of the public wharf in the city of Jeffersonville. A demurrer was sustained to his complaint, and this appeal is from the final judgment rendered against him on demurrer.

The complaint shows that the plaintiff is a citizen of Jeffersonville, and the owner of a two-story frame dwelling house occupied as a family residence, and worth $10,000; that directly in front of his house is a street sixty feet in width, and between that and the Ohio river is the public wharf, or levee of the city; that the defendant is a corporation having no residence in the city, or especial interest in or ownership of said wharf, and no corporate power to condemn or take either private or public property for use in its business; that on the 8th day of April, 1890, the defendant, without the consent of the plaintiff, wrongfully entered upon the strip of land used for wharf purposes directly in front of the plaintiff's residence, and has begun the construction of a logway, or elevated platform of heavy timbers, with

posts and supports; that a portion of the logway is to be ten feet in height, gradually sloping toward the river, and will be at least one hundred feet in length; that it is the intention of the defendant to continue the construction of the logway until it reaches the river, and when so permanently laid and constructed it intends to place thereon, use and operate a steam engine with convenient apparatus to drag large and heavy logs along said platform from the river to the top of said wharf close to plaintiff's residence; that the logway and its accompanying timbers and accessions will be so large, and project so high above the surface of the wharf, that it will be impossible for the plaintiff or his family, or the general public, to cross over the logway and raised platform to use the wharf, either for wharf or other lawful purposes; that this wrongful and unlawful attempt to permanently obstruct this portion of the wharf is, as plaintiff believes and charges, without the consent or license of the mayor and common council of the city; that if said logway and platform are erected and a steam engine placed thereon and used for the purpose of pulling logs as above described, he and his family will be greatly inconvenienced and irreparably injured, and their comfortable enjoyment of the said property will be greatly hindered, disturbed, essentially interfered with and prevented, by reason of the dust, dirt, noise, smoke and vapors; and the said property will be rendered, by reason of the said dust, dirt, noise, smoke and vapors, and by constant danger from fire, uninhabitable and greatly depreciated in value.

The complaint also charges that in addition to the personal discomfort, annoyance and depreciation in value of his property, the plaintiff, as a citizen and resident taxpayer of Jeffersonville, will, with his family, be permanently deprived of the right to use and drive over said part of the wharf occupied by the barrier and obstruction to be erected by the defendant, which right he now has, in common with the general public, and which he has never surrendered to anyone,

and the plaintiff says that the erection and maintenance of said logway and platform by the defendant will greatly, irreparably and permanently injure his said real estate, and that he can not be compensated therefor in damages.

The complaint does not show that the appellant will suffer injury as a taxpayer of the city, on account of the proposed construction of the logway complained of. It is not made to appear that his taxation will be increased either directly or indirectly.

Neither does it show a right of action in his favor on account of the deprivation of the right which he, in common with the general public, has to use and drive over that part of the wharf occupied by the obstruction. *McCowan* v. *Whitesides*, 31 Ind. 235; *Cummins* v. *City of Seymour*, 79 Ind. 491 (501); *Matlock* v. *Hawkins*, 92 Ind. 225; *Dwenger* v. *Chicago, etc., R. W. Co.*, 98 Ind. 153; *Terre Haute, etc., R. R. Co.* v. *Bissell*, 108 Ind. 113.

Whether, if the common council had granted the appellee the right to obstruct the wharf, an action could have been maintained by a citizen suing in behalf of himself and others, although discussed in the briefs of counsel, is not before us for decision.

The appellant insists that the common councils of cities have not the same exclusive jurisdiction of public wharves that they have of the streets and alleys, and therefore no right to grant the public wharves for the permanent use of private citizens.

The distinction, if it exists, is not material in this case. While the statute (section 3161, R. S. 1881) purports to grant the common council exclusive power over the streets, highways, alleys and bridges within such city, it must be understood that this power can only be exercised for the use and benefit of the public. Streets, alleys and highways are held in trust for the public for public purposes, and no other. A common council has no power or authority to authorize the permanent possession of a public highway, street or alley for

private purposes. *State* v. *Berdetta*, 73 Ind. 185; *Sims* v. *City of Frankfort*, 79 Ind. 446; Elliott Roads and Streets, 490.

In *Pettis* v. *Johnson*, 56 Ind. 139, it was held that the city of Indianapolis had no power to authorize a property-owner to put up an iron stairway in an alley, although the grant was founded upon a valuable consideration, and in pursuance of a contract by which the city acquired the use of the rooms, to which the stairway led, for its council chamber and various city offices.

The erection of a structure of the character and permanency described in the complaint, for purely private purposes, upon or across the public streets, alleys, highways, or wharves of a city is unlawful, and such as the common council can not authorizé and should not tolerate.

Where a street, or public way, is used for public purposes, such as for street railways or other improved methods of travel, the common councils have authority to permit permanent obstructions to be placed in the streets, but they have no such power when the purpose is strictly private and the public in no manner served.

This distinction is illustrated by the case of *Mikesell* v. *Durkee*, 34 Kan. 509, where the appellees were, by the permission of the city, about to construct a railroad upon a street of the city, not for the use of the public, but to transport grain to and from their elevator to a railroad. It was held that the city had no right to grant such permission, and that an abutting lot-owner whose property would be injured might perpetually enjoin its construction.

We have stated that in so far as the appellant has suffered, or is about to suffer, injuries in common with the general public, he has no right of action. It is the province of the public authorities to procure redress for public wrongs; but when an individual suffers a special injury the law affords him redress upon his own application.

In the late case of *First Nat'l Bank of Vernon* v. *Sarlls*,

129 Ind. 201, it was said: "It is only where the injury is general, and public in its effects, and no private right is violated, in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights."

The mere fact that the injury is greater in degree to a particular individual than to others will not entitle him to relief. *McCowan* v. *Whitesides, supra; Dwenger* v. *Chicago, etc., R. W. Co., supra; Terre Haute, etc., R. W. Co.* v. *Bissell, supra; Sohn* v. *Cambern*, 106 Ind. 302; *Indiana, etc., R. W. Co.* v. *Eberle*, 110 Ind. 542; *Fossion* v. *Landry*, 123 Ind. 136; *Chicago, etc., R. R. Co.* v. *Eisert*, 127 Ind. 156; Elliott Roads and Streets, 500.

It is not necessary to a right of action by the owner of a dwelling-house, that the property itself will be injured, but if its comfortable enjoyment will be essentially interfered with by dust, smoke and offensive odors, relief by injunction will be awarded. *Owen* v. *Phillips*, 73 Ind. 284.

We are satisfied that the complaint charges an injury to the plaintiff, distinct from that of the general public. The injury to the use and enjoyment of his dwelling-house, and its consequent depreciation in value, which is charged in the complaint, and admitted by the demurrer, is a personal and not a public injury.

The fact that the obstruction and use of the public wharf, and the use of the engine and machinery, is for the use of a private company and for their convenience and profit, and not for the general public, is of controlling importance in this class of cases. *Kincaid* v. *Indianapolis Natural Gas Co.*, 124 Ind. 577.

The judgment is reversed, with instructions to overrule the demurrer to the complaint.

Filed April 26, 1892.

No. 15,763.

TINDER v. TINDER ET AL.

131 381
134 445
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DEED.—*To Heirs of Person Living.—Effect of.*—Where a warranty deed was executed to "Sarah A. Tinder and the heirs of Simeon Tinder, by Sarah A. Tinder his wife," both Simeon Tinder and his wife being alive at the time of the execution of the instrument, the deed conveyed the land therein described to Sarah A. Tinder and her children by Simeon Tinder. The word "heirs" in said deed was not used in its strict legal sense, but in the sense of children, and the conveyance operated to a person named, and a designated class of persons whose identity could be established, and conveyed them equal shares in the land. The deed refers to a class, and not to possible descendants. There is manifested an intention that the land shall pass directly out of the grantor into the designated grantees. The estate, it is obvious, was intended to leave the grantor and vest directly and immediately in the grantees.

SAME.—*Word "heirs" construed.—Intention of Grantor.*—A conveyance of land describing the grantees as heirs of a person named and still living, is not ineffective on the ground that a person can not have heirs during life, when the language used clearly shows that the word "heirs" was not employed in its strict legal sense, but as meaning children, and that to hold otherwise would result in manifest injustice, and defeat the intention of the grantor.

SAME.—*Construction of Deed.*—In construing a deed it is the duty of the court to assign to the words of the grantor their fair and reasonable meaning, so that the intention of the grantor may be discovered and carried into effect.

From the Fountain Circuit Court.

H. H. Dochterman, for appellant.

C. M. McCabe and *J. Bingham*, for appellees.

ELLIOTT, C. J.—Woodruff Beals was the owner and in possession of the land here the subject of controversy on the 9th day of June, 1868, and on that day he and his wife executed a warranty deed wherein the grantees were described as "Sarah A. Tinder and the heirs of Simeon Tinder by Sarah A. Tinder his wife." Simeon Tinder and his wife were living at the time the deed was executed. James Tinder, Lewis Tinder, David Tinder, Joseph Tinder and Mary Tinder were his children by his wife Sarah A. Tinder, and were

then living. On the 4th day of October, 1884, James Hendy and Sampson Reed recovered a judgment against David Tinder and Sarah A. Tinder, and on this judgment a sale of the land was made by the sheriff to Reed, who assigned the certificate of the sheriff to Charles E. Bove and John B. Schwin, to whom a deed was executed. The land was of the value of twelve hundred dollars, and was sold by the sheriff for sixty-eight dollars. On the 6th day of June, 1887, Bove and Schwin conveyed the land by a deed of quitclaim to Lewis Tinder. On the 15th day of September, 1886, David Tinder brought suit against Bove and Schwin to quiet title to an undivided one-fourth interest in the land, but judgment was rendered against him. The claim of David Tinder on the action named was founded upon the deed executed by Woodruff Beals, and the title asserted by Bove and Schwin was based upon the deed executed to them by the sheriff. The facts, of which we have given a synopsis, are set forth in a special finding of facts upon which the trial court stated conclusions of law adverse to the appellant. The controlling conclusions stated are these: "1st. The deed to Sarah Tinder would not at common law have created an estate tail for the reason that the entail is not to her heirs, but to the heirs of one who is not a grantee. 2d. The word heirs on the said deed was used in the sense of children, and the conveyance operated to a person named and a designated class of persons whose identity could be established and conveyed them equal shares in the land. 3d. Lewis Tinder is the owner of one undivided half of the land, and is entitled to have his title quieted thereto."

The theory of the appellant, Lewis Tinder, is that he is the owner of all the land, and as such was entitled to a decree quieting his title.

The theory is by counsel asserted to be sound upon the ground that Sarah A. Tinder is the sole legal grantee in the deed executed by Woodruff Beals, and that the sheriff's sale upon the judgment against her vested title in the appellant's

grantors, the purchasers at the sheriff's sale, Bove and Schwin. If it be true, as counsel assert, that the deed did vest the whole estate in Sarah A. Tinder, then the conclusion is valid. The pivotal question, therefore, is, did the deed convey to Sarah A. Tinder the entire estate in the land to the exclusion of the children of Simeon Tinder by her?

There are authorities which lend support to the doctrine that a conveyance of land, describing the grantees as the heirs of a person named, is ineffective. The doctrine is placed upon the rule of the common law that a person can not have heirs during life, but, as shown in *Huss* v. *Stephens*, 51 Pa. St. 282, and in *Stephens* v. *Huss*, 54 Pa. St. 20, the rule does not apply where registry stands in the place of livery of seisin. The whole series of cases in America seems to rest on the case of *Hall* v. *Leonard*, 1 Pick. 27, and that case, as declared in *Huss* v. *Stephens*, *supra*, was not well decided. It is possibly true that this court is committed to the doctrine of *Hall* v. *Leonard*, *supra*, for it has been approved by our decisions. *Winslow* v. *Winslow*, 52 Ind. 8; *Outland* v. *Bowen*, 115 Ind. 150. But while it may be true that we are committed to the rule stated, it is also true that the court has manifested a purpose to restrict rather than enlarge its operation. *Lyles* v. *Lescher*, 108 Ind. 382. The rule is the product of an adherence to a dry technical doctrine that often defeats the clear intention of a testator or grantor, and seldom gives it effect. It generally produces injustice, since it often sacrifices substantial rights to fancied consistency or useless fiction. The rigid adherence to the meaning ascribed by law writers to the term "heir" or "heirs," has resulted in giving many instruments a meaning very different from that intended by their framers. It is not only the unlearned who use the term "heirs" as meaning "children," for the greatest of literary men often and often use the term as meaning children. And so do the courts. *Griswold* v. *Hicks*, 132 Ill. 494 (22 Am. St. Rep. 549); *Ridgeway* v. *Lanphear*, 99 Ind. 251; *Hull* v. *Beals*, 23 Ind. 25; *Star, etc., Co.* v. *Morey*, 108

Mass. 570; *Urich's Appeal*, 86 Pa. St. 386 (27 Am. Rep. 707); *King* v. *Beck*, 15 Ohio, 559; *Scott* v. *Guernsey*, 48 N. Y. 106. We think the rule is not one to be applied except in cases falling bodily within its operation. We do not regard the case before us as within the rule, even upon the concession that the rule certainly exists, and is a general one. We think the case falls within the wide and sensible general rule that the intention of a grantor will be sought, and, if discovered, carried into effect.

The plain meaning of the grantor was that the children of Sarah A. Tinder and Simeon Tinder should take the land, since "the heirs of Simeon Tinder by Sarah A. Tinder, his wife," could be no others than their children. There could be no line of descendants, because the heirs meant by the grantor must be the particular class designated in the deed, namely, the heirs of Simeon Tinder by his wife, Sarah. The deed refers to a class and not to possible descendants. If the grantor had intended to vest the entire estate in Sarah A. Tinder, the superadded words, "and the heirs of Simeon Tinder by Sarah A. Tinder, his wife," would not have been employed, since without them the deed would, under our statute, have vested the whole estate in her. The courts have no right to arbitrarily and causelessly reject the words of a deed. *Shimer* v. *Mann*, 99 Ind. 190. Words written in a deed are to be given effect, unless there is sufficient reason for disregarding them. *Essick* v. *Caple*, *ante*, p. 207. There is here no such reason. The words employed by the grantor can be given full effect and his obvious intention carried into effect by adjudging that the deed conveys the land to Sarah A. Tinder and her children by Simeon Tinder. In so adjudging we do no more than give effect to a very old rule of the law, one remounting to the case of *Burchett* v. *Durdant*, 2 Vent. 313. The rule has been approved by our own and other courts. *Shimer* v. *Mann*, *supra*; *Vanorsdall* v. *Van Devanter*, 51 Barb. 137; *Heard* v. *Horton*, 1 Denio, 165; *Jack* v. *Fetherston*, 9

Bligh, 237; *Darbison* v. *Beaumont*, 1 P. Wms. 229. We adhere to a long settled rule, and give just effect to the deed by adjudging that the words "heirs of Simeon Tinder by Sarah A. Tinder, his wife," are descriptive of a class, and mean the children of the persons named, and not an indefinite line of descendants. Our own decisions clearly affirm that the word "heirs" may often be taken as descriptive of a class who shall take directly from the grantor. *Conger* v. *Lowe*, 124 Ind. 368; *Underwood* v. *Robbins*, 117 Ind. 308; *Mellett* v. *Ford*, 109 Ind. 159; *Brown* v. *Harmon*, 73 Ind. 412; *Rapp* v. *Matthis*, 35 Ind. 322; *Rusing* v. *Rusing*, 25 Ind. 63; *Jones* v. *Miller*, 13 Ind. 337. In the deed we are considering there is manifested an intention that the land shall pass directly out of the grantor into the designated grantees, and there is nothing warranting the inference that the descendants of the grantor or grantees shall take remotely or indirectly. The estate, it is obvious, was intended to leave the grantor and vest directly and immediately in the grantees.

The case before us is easily discriminated from one wherein the grantor attempts to create a particular estate and limit a remainder over. The attempt here was to vest in Sarah A. Tinder and "the heirs of Simeon Tinder by Sarah A. Tinder, his wife," the whole estate, and to vest it immediately. There was no purpose to create a remainder nor to do anything else than vest in Sarah A. Tinder and her children begotten by her husband Simeon a present estate in all the land conveyed. There was neither a dividing of interests nor a carving out of estates. The fact that there was no attempt to carve out a particular estate or create a remainder effectively marks this case as one belonging to a different class of cases from the class represented by such cases as *Outland* v. *Bowen*, *supra*; *Moore* v. *Littel*, 41 N. Y. 66; *Gifford* v. *Choate*, 100 Mass. 343; *Ramsdell* v. *Ramsdell*, 21 Me. 288; and *Jones* v. *Bacon*, 68 Me. 34. If there had been

an attempt to create an estate in remainder we should be faced by a very different question.

An examination of particular instances will strengthen the conclusion we have declared. In the case of *Fountain County, etc., Co.* v. *Beckleheimer*, 102 Ind. 76, the words of the deed were, "To have and to hold the same to the said Nancy West and her present heirs forever," and it was held, after a full review of the authorities, that Nancy West and her apparent heirs took the estate in common. The restrictive words in the deed before us are unquestionably clearer and stronger than was the qualifying word "present" in the deed construed in the case to which we have referred. The deed which received construction in the case of *Heath* v. *Hewitt*, 127 N. Y. 166, conveyed land to "the heirs of Warren Heath," a living person, and it was held to vest title in the children of Warren Heath. The court quoted with approval from *Heard* v. *Horton*, *supra*, this statement of the law: "Where the will recognizes the ancestor as living, and makes a devise to his heir, *eo nomine*, this shows that the term was not used in its strictest sense, but as meaning the heir apparent of the ancestor named." In the deed which occupies our attention, not only is the ancestor recognized as living, but it is also unequivocally indicated that the heirs meant are those of Simeon Tinder by his wife Sarah. By no possibility could such heirs be other than his and her children, and, as such, his heirs presumptive or apparent. There was, therefore, a grant to a particular class of persons, and not to heirs indefinitely. In the case of *Tucker* v. *Tucker*, 78 Ky. 503, the deed purported to convey land to "Ann Tucker and the heirs of John C. Tucker," and the court gave judgment vesting title in Ann Tucker and her children, saying among other things, that "We are of the opinion that the word heirs, where the conveyance speaks of the heirs of John C. Tucker, should be taken as synonomous with children, and to have the same effect as if the names of the then living children (Foster and Rachel) had

been mentioned in the deed. An absolute estate was vested, *in præsenti*, in Martha Ann Tucker and her two children, Foster and Rachel." Another case in the same court gives full consideration to the question. *Brann* v. *Elzey*, 83 Ky. 440. The deed in that case purported to convey the land to "Jane Williams, wife of Isaac Williams, and to the heirs of her body by the said Isaac Williams," and it was held that the deed conveyed the land to Jane Williams and her children. The court gave the question full discussion, saying, among other things, "The words 'to the heirs of her body, by the said Isaac Williams,' plainly mean their children. This was clearly not only the intention of the grantor, but it is the obvious meaning of the language." In the case of *Tharp* v. *Yarbrough*, 79 Ga. 382 (11 Am. St. Rep. 439), it was held that the words "to the heirs of Robert A. Tharp, their heirs and assigns," conveyed the land to the children of Robert A. Tharp.

The object of the description of a grantee in a deed is to supply the means of identifying the person to whom the land is granted. Neither the description of the thing conveyed nor a description of the person to whom it is conveyed can of itself identify the person or thing; all that it can do is to furnish the means of establishing the identity. A description which effects that purpose is sufficient. The description of the grantees in the deed before us does supply the means of identifying all of the grantees, for no one can doubt that they were Sarah A. Tinder and her children by Simeon Tinder.

The appellant's counsel say that a man can not have heirs during life, and this is true of heirs in the strict legal sense, but it is not true of heirs in the popular sense. If we could say that the word "heirs" was employed in its strict legal sense by the grantor in the deed before us, we might apply the maxim to which counsel refer, but the associated words take from the word "heirs" its strict legal meaning. The word "heirs" can not have its strict legal meaning, and as it

can not have that meaning it must be assigned the meaning popularly ascribed to it. We agree with counsel that the word "heirs," when used in its strict legal sense, is one of controlling power. *Allen* v. *Craft*, 109 Ind. 476. But we can not agree that Woodruff Beals employed the word in its strict legal signification. We interpret the deed as manifesting an intention to convey the land to Sarah A. Tinder and her children, and in doing this we assign to the words of the grantor their fair and reasonable meaning, rejecting the technical and rigid meaning placed upon the language of the instrument by the appellant.

Judgment affirmed.

Filed April 21, 1892.

No. 15,780.

THE STATE, EX REL. WALDEN, *v.* VANOSDAL.

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COUNTY SUPERINTENDENT.—*Election of.—Township Trustees.— Quorum.— Members Present Declining to Vote.*—Where the township trustees of a county, six in number, met on the day appointed by statute for them to do so, to elect a county superintendent, and after perfecting their organization, proceeded to ballot for such officer, and after a number of ballots had been taken, without an election, three of the trustees, after protesting against further balloting, stepped from the part of the room occupied by them and mingled with the spectators, and thereafter another ballot was taken, said withdrawing trustees still remaining in the room but not voting, and the other three trustees cast their votes for the appellee, he was legally elected to the office of county superintendent if the requirements of the law were complied with in other particulars. There was no such absence of the three trustees as can be said to have broken a quorum. Being present it was their duty to act. The presiding officer had a right to treat them as part of the board, to treat them as present and failing or refusing to vote.

SAME.—*Election of After Midnight —Validity of.*—Where the township trustees of a county met on the first Monday of June, as required by section 4424, R. S. 1881, to elect a county superintendent, and organized and proceeded to the election, they had the right, and it was their duty

to complete the work for which they were convened, and the fact that they were unable to complete their work before the hour of twelve o'clock at night did not invalidate their acts done after that hour.

From the Switzerland Circuit Court.

C. S. Tandy, *G. S. Pleasants* and *F. M. Griffith*, for appellant.

W. T. Ward, *J. A. Works*, *J. A. Vanosdal* and *J. T. Ellis*, for appellee.

OLDS, J.—This is an action brought by the relator, Marion C. Walden, against the appellee, James A. Vanosdal, to determine the title to the office of county school superintendent.

The relator filed a complaint in four paragraphs. The first and second paragraphs were withdrawn by leave of court, and a demurrer was sustained to the third and fourth paragraphs. The ruling upon the demurrer to the complaint is assigned as error, and presents the questions for decision.

The relator was elected county school superintendent in June, 1887, and claims title to the office by reason of holding over after the time for the election of his successors in 1889. And the appellee claims title to the office by virtue of an election by the township trustees in 1889.

The relator alleges facts in each of the third and fourth paragraphs of the complaint which he contends show that the appellee was not elected in 1889, nor was any person elected to succeed the relator.

The facts in the third paragraph show that in said county of Switzerland there were six township trustees; that they all met at the auditor's office in said county on the first Monday of June, 1889, and elected one of their number president, and determined to elect a county school superintendent by ballot, and they commenced balloting, and balloted 236 times, there being six votes cast each time, the highest for any one candidate being three, and on the 237th ballot the appellee received three votes, and no votes were cast for any other candidate, and the president declared him elected. One

of the trustees not voting said: "Mr. Clerk, we protest against the proceedings, and demand that the record so show."

The fourth paragraph shows the same state of facts, and in addition alleges that, having been in continuous session from one o'clock P. M. of said day until twelve o'clock at night, and failing to elect, three of the trustees, deeming it of no use to continue balloting, announced that, the hour of midnight of the first Monday of June having passed, they would refuse to act longer, and would take no further part in said proceedings, and said three trustees then withdrew from said meeting by getting up and leaving the place where all of said balloting had taken place, and stepping away therefrom into the crowd of by-standers.

There are other general averments that they had withdrawn, and there was no quorum present, but these specific averments control, and show what was in fact done, and there are averments that the final vote was taken after twelve o'clock at night.

The full number of trustees met and organized, and must be held to be present when the final vote was taken and the appellee declared elected. There was no such absence of the three trustees as can be said to have broken the quorum. As appears from the facts alleged the meeting was in the auditor's office, and there were bystanders looking on and listening to the proceedings. The three trustees stepped from the part of the room occupied by them among the bystanders. They could not change from trustees to mere spectators in the same room when they still had an opportunity to act and vote with the others and thus prevent an election. Being present it was their duty to act; they were, in fact, present. The president had a right to treat them as a part of the board, and they must be treated as present and failing or refusing to vote. The statement to the clerk by one of them that they protested, or that they would take no further part, and stepped out among the bystanders,

amounted to nothing. If the votes cast for the appellee by the other three trustees, all being present, and three failing to vote, elected him, this statement to the clerk did not prevent or nullify such election. If the facts showed that the three trustees had, in fact, withdrawn from the meeting and gone from the room, so as to have, in fact, left but three trustees in session, it would present an entirely different question, but all that can be said to be shown by the facts alleged is, that all of the trustees met and organized and proceeded to an election, and balloted 236 times; that there were bystanders present watching and listening to the proceedings, and after 236 ballots had been taken, without an adjournment, three of the trustees declared their intention not to act further, and stepped from the places they were occupying out among the bystanders, but still in the presence of and in the room with the other trustees, when the president ordered another ballot to be taken. Under these circumstances they must be treated as present and not voting. Being present when the ballot was ordered, if they desired to prevent the election of the appellee, it was their duty to vote. It remains then to determine whether or not the appellee was elected by the three votes cast for him, the other three trustees being present and not voting.

The question as to whether or not the appellee, Vanosdal, was elected, having received a majority of the votes cast, there being a quorum present, has been decided by this court in *Rushville Gas Co.* v. *City of Rushville*, 121 Ind. 206, and *State, ex rel.*, v. *Dillon*, 125 Ind. 65. Under the rule, as laid down by these decisions, it must be held that Vanosdal was duly elected. The principle settled by these decisions is to the effect that the presence of the other trustees suffices to constitute the elective body, and if any of them neglect to vote it is their own fault, and the assembly being sufficient to constitute an elective body, the person receiving a majority of the votes cast is duly elected. In this case four of the trustees would constitute a quorum, but the

full number, six, were present, and three cast their votes for the appellee; the other three refused to vote, and the chairman declared him elected. Under the authorities we have cited he was duly elected, unless the fact that the hour of midnight had arrived terminated all authority of the trustees to act in the matter, and rendered any election after that hour void. We do not think the election invalid on account of having been made after the hour of 12 o'clock at night. The trustees met on the first Monday of June, as required by the statute, section 4424, R. S. 1881, and continued in session until an election was had. Having met and organized on the proper day, and commenced balloting for the election of a county superintendent, they had the right, and it was their duty, to complete the work for which they were convened, and the fact that they were unable to complete their work before the hour of 12 o'clock at night did not invalidate their acts done after that hour. The law imposed upon the trustees the duty of electing a county superintendent, and commanded them to meet on the first Monday in June for that purpose, and having met and organized upon that day, they undoubtedly had the right to continue their session until there was an election, even though their session extended beyond the midnight hour. If they had adjourned without appointing a day to meet again to resume their duties of electing, they would probably have had no authority to have met again for that purpose, as the statute makes no provision for another meeting for such purpose, but as the statute commands the trustees to meet on the first day of June and appoint a county superintendent, if they were unable to complete their work and make an appointment during that day it would seem but a reasonable construction of the statute to permit an adjournment from day to day until an election was had. In such a case they would be compelled to adjourn without performing the duty imposed upon them by statute, or continue their sessions from

day to day until an election was had. *State, ex rel.*, v. *Harrison*, 67 Ind. 71; *Sackett* v. *State, ex rel.*, 74 Ind. 486.

The latter case intimates, without deciding, what we regard as the correct rule, that if necessity requires it there may be an adjournment from day to day for the purpose of securing an election, and sustains our holding in this case; and it is not necessary in this case to hold even that the board may adjourn over, for in this case they continued in session until an election was had.

There was no error in the ruling of the court in sustaining demurrers to the third and fourth paragraphs of complaint.

Judgment affirmed, with costs.

Filed April 29, 1892.

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No. 16,403.

Racer v. The State, for Use of Rhine, Drainage Commissioner.

Drainage.—*Pleading.*—*Action to Foreclose Lien.*—In an action to enforce the collection of an assessment levied to pay the cost of constructing a public ditch, an answer is bad which proceeds either upon the theory that the commissioner of drainage had no authority to enforce the assessment because the work was not completed, or because the work had not been done, and would not be done, according to contract.

Same.—*Drainage Commissioner.*—*Levying of Assessments.*—The commissioner of drainage under our statutes is authorized to exercise a reasonable discretion in levying assessments to secure in advance money to pay for work in progress, but not completed.

Same.—The fact that the contract between the drainage commissioner and the party employed to do the work provided that "No part of said work shall be accepted from said Henry C. Paul as completed until all of said ditch down stream therefrom shall have been completed according to said specifications" did not prevent the commissioner from levying an assessment before the work was so completed.

Same.—*Assessment to Meet Claim when it Matures.*—While the powers of a

drainage commissioner are strictly statutory, he has nevertheless a reasonable and limited discretion. In providing in advance the means of paying the contractor when his claim should mature, the commissioner was acting within the scope of his authority, and did not abuse the discretion conferred upon him by statute.

SAME.—*For what Purposes Assessments May be Made.—Presumption as to.*—An assessment may be made and enforced to pay other expenses than those directly incurred in constructing the ditch. As the commissioner can have no other funds except such as are derived from assessments, it follows that when it becomes necessary and proper under the law to secure funds, he may make an assessment. When the contrary does not appear the courts must assume that there was a valid reason and proper cause for making an assessment. See Elliott's Supp., section 1178.

SAME.—*Neglect of Duty by Commissioner.—Remedy of Land-Owner.*—It was the duty of the drainage commissioner to compel the performance of the work in substantial compliance with the contract, but his failure to do so would not constitute a defence to a suit to enforce an assessment. The remedy of the land-owner is to make application to the court having control of the work, and whose agent the commissioner is, to compel a performance of duty by the contractor and the commissioner.

PUBLIC OFFICER.—*Construction of Public Work.—Performance of Duty.—Presumption.*—A public officer, whose duty it is to construct or supervise a public work, is presumed to rightfully discharge his duty, and what he does within the scope of his authority is regarded as *prima facie* right, and in accordance with the law.

PLEADING.—*Answer Can Not Perform a Double Office.*—A single paragraph of answer can not perform a double office. It can not be good as a denial and also as a plea in confession and avoidance.

SAME.—*Plea in Confession and Avoidance.*—An answer can not be good as a plea in confession and avoidance unless it overcomes by affirmative allegations the *prima facie* case which it confesses and seeks to avoid. The affirmative allegations are the controlling ones, and those which are equivalent to the denials embraced in the answer of general denial are without influence.

SAME.—*Must be Judged from General Scope.—Matters of Judicial Knowledge.—Averments Contradicting.*—A pleading is to be judged from its general scope and tenor, and not from fragmentary statements or general conclusions east into it. The general statements must yield to the specific allegations. Averments contradicting matters of which judicial knowledge is taken are generally unavailing.

SAME.—*Must Proceed Upon Definite Theory.*—A pleading must proceed upon some definite theory, and must be good upon the theory on which it professes to proceed.

PRACTICE.—*Demurrer.—When Sustaining of Unavailable Error.*—There is no available error in sustaining a demurrer to a paragraph of an answer

where the same evidence is admissible under other paragraphs of the answer which are allowed to stand.

From the Blackford Circuit Court.

J. N. Templer, *R. S. Gregory* and *A. C. Silverburg*, for appellant.

W. H. Carroll; *G. Dean*, *B. G. Shinn* and *E. Pierce*, for appellee.

ELLIOTT, C. J.—The appellant prosecutes this appeal from a decree rendered in a suit brought on the relation of Charles A. Rhine, commissioner of drainage, to enforce the collection of an assessment levied to pay the cost of constructing a public ditch. The proceedings for the construction of the ditch were had in the Blackford Circuit Court, and were conducted under the drainage law of 1881, and the amendatory statute of 1883; section 4273, R. S. 1881, *et seq.*; Elliott's Supp., sections 1175 to 1183. The ditch was ordered to be constructed by the circuit court, the order was so far carried into effect by the execution of contracts, bonds and the like, as well as by the performance of work by the contractor, that six miles of the ditch had been constructed at the time this suit was brought, leaving five miles of the entire line of the ditch to be constructed. The appellant, against whose land an assessment was levied, answered, setting forth the contract for the construction of the ditch, which contract reads as follows:

"Smith Casterline, commissioner of drainage of Blackford county, Indiana, charged with the construction of the 'Big Lick Creek Ditch,' of the one part, and Henry C. Paul, of the other part, contract as follows: Said Henry C. Paul agrees to construct all that part of the Big Lick Creek Ditch which extends from station 0 to 668 thereof in said county, in all respects according to the specifications and requirements thereof in the report of the commissioners of drainage, confirmed by the judgment of the circuit court of said county establishing said ditch. No part of said work shall be ac-

cepted from said Henry C. Paul as completed until all of said ditch down stream therefrom shall have been completed according to said specifications; and said Henry C. Paul agrees to complete the work herein contracted for by the 12th day of March, 1891, or within ten days after all that part of said ditch which is down stream therefrom shall have been so completed as aforesaid, and accepted by said drainage commissioner and by the court establishing said ditch, and in consideration of all which said Henry C. Paul is to receive of said Casterline, commissioner of drainage, the sum of $15,498 out of the money arising from the assessments made by the drainage commissioners and confirmed by said court for the construction of said ditch. And it is agreed that Casterline shall not, in any event, be liable, either personally or as such commissioner, to pay any money to said H. C. Paul on account of this contract or the construction of the work herein contracted for except such money as he may obtain from said assessments; but that he shall use due diligence to so collect and apply said assessments as to pay said Henry C. Paul all money that shall become due him hereunder."

This contract is made with special reference to the act of the Legislature of this State, entitled "An act concerning drainage," approved April 8th, 1881, and the amendments thereof in chapter 126 of the Acts of 1883, approved March 8th, 1883.

The answer, after setting forth the contract, alleges "That by the terms of said contract with the said Paul for the construction of said ditch, no part of the cost and contract-price for the construction thereof is to be paid until said ditch shall have been constructed according to the plans and specifications, order and judgment of the court in the establishment thereof, and to the satisfaction and acceptance of said court; that said commissioner, long before the commencement of this suit, collected of the benefits so assessed, to wit: In May, 1889, more than $1,000, with which money he, as

such commissioner, then and there, and long before the commencement of this suit, paid and settled all costs and expenses incident to the establishing of said ditch, as well as those incurred in preparation of reports and expenses which the petitioners incurred in the preparation and presentation of their said petition for the establishment of their said ditch, and all other expenses ordered and directed to be paid by the court by said commissioner, and all expenses of every kind and description connected with the location and establishment of said ditch and prosecution of said work, except the cost of construction agreed upon as set forth in said contract with the said Paul, which amount is not to be paid until said ditch shall have been constructed as therein provided for and in strict conformity with the plans and specifications for the construction of said ditch, as the same were reported by said commissioners, and ordered and adjudged by said court in the establishment thereof; that said commissioner now has in his hands, as such commissioner, so collected by him, a large sum of money, to wit, more than $100, after paying and adjusting all costs and expenses incident to the establishment of said ditch and the prosecution of said work as aforesaid, which amount of money is more than will be needed by said commissioner, or necessary in the further prosecution of said work, until the cost of construction as provided for in the said contract with the said Henry C. Paul shall become due and payable; that by the terms of said agreement the said contractor, Paul, is to have said ditch completed by March, 1891.

"The defendant avers that after the making of said contract for the construction of said ditch with the said Paul, the said Paul, with the full knowledge of said commissioner, commenced the construction of said ditch, and proceeded to construct the same by the use of a dredging machine, and has proceeded and constructed in manner and form as hereinafter stated some five miles of the same, and is proceeding by the use of said machine, and with the knowledge and per-

mission of said ditch commissioner, to the construction of all the remaining portions of said ditch; that the route and lines of said ditch lie in and through a section of the country composed principally of loam, loose earth and quicksands; that the said contractor and the said commissioner began the construction of said ditch with said machine at the source thereof and proceeded toward the outlet, and did not, as they should have done, begin at the outlet and proceed to the source; that said machine is so constructed as that the same is managed and operated by steam power generated by the use of engine and boiler, floated in a boat to which levers and scoops are attached for removing the earth; said boat is a frame work so constructed as that in order to operate it it is made necessary to be sunk perpendicularly into both sides and banks of said ditch from two to five feet, and in such condition pinioned by the use of pillars and posts to hold it steady and in place while the work is being done; that in the use of said machine as aforesaid great quantities of water are retained in that part of the ditch where the excavations are made, by reason whereof the banks and grounds are kept thoroughly saturated, and in operating said machine the banks and ground are jarred and broken so that they crumble in; that in that portion of the ditch now dug, being some five miles or more as aforesaid, the same has been done without any regard to the plans and specifications provided therefor, and in total violation of the order and judgment of the court in establishing the same; that the said ditch has been cut and constructed from three to ten feet wider at the top, through the whole course thereof, than said plans and specifications, order and judgment of the court provide for; that the banks thereof are cut perpendicularly to a depth of from three to seven feet, without giving or providing for any slope thereto whatever, and the residue of said banks to the full depth of said ditch has been scooped and is being scooped by the use of said machine so as that the same, to wit: said banks are concave and

irregular, and the bottom of said ditch, through the whole course thereof, has been constructed, and is being constructed, from two to ten feet wider than is provided for by said plans and specifications and order and judgment of the court establishing the same; that the whole of said ditch now constructed by said contractor, Paul, and the said commissioner, has been constructed by the use of said machine in manner and form as above stated. The defendant avers that said ditch so constructed has been entirely obliterated, and has destroyed the lines, courses, metes and bounds, plans and specifications adopted by said court, and ordered and adjudged as the lines, courses, metes and bounds, plans and specifications for the construction of said ditch, so that the same can not now be, nor can it hereafter be, made to conform with the plans and specifications adopted for the construction of said ditch; that the said contractor and the said relator, commissioner, have, in the construction of said work, destroyed said ditch, and made it absolutely impossible ever to be constructed in manner and form as ordered and adjudged by the court; that on account of the great depth to which said ditch has been cut and constructed by the said contractor and the said relator, and the banks thereof having been cut perpendicularly and in a concave manner, and the water having been retained therein for the floating of said machine, the said banks have broken, caved and crumbled so that in many places the said ditch is now forty to fifty feet in width, where the same should have been, by the plans and specifications therefor, twelve to fifteen feet in width; that said ditch, instead of being an improvement and benefit to the land through which it passes, has been made so as that the same is an irreparable damage thereto; that the said relator, commissioner, and the said contractor are proceeding to the completion of said work by the use of said machine in manner and form as above stated; that by the use of said machine it is physically impossible to cut or construct said ditch in whole or in part in conformity with the said plans

and specifications, order and judgment of said court for the same; that the sides are perpendicular and concave, and the bottom is concave and irregular, and in every particular said ditch at top and bottom and sides is from three to ten feet wider than provided for by said plans and specifications, by reason whereof the same can never be made to conform to said plans and specifications; that said work, under and by virtue of said contract, is not to be paid for until the same has been completed according to the plans and specifications as aforesaid, and in conformity with the order and judgment of the court establishing said ditch. The defendant further avers that by the acts and doings of said relator in the construction of said ditch, the said plans and specifications, lines and courses, metes and bounds of said ditch have been destroyed, and the completion of said work made impossible; that the collection of said assessments is not necessary now or at any time; that it is not necessary that the said relator, commissioner, should collect said assessments, or any of them, now or at any time, as the same will not be needed under and by virtue of said contract in the construction of said ditch, because the said ditch has been destroyed and the acceptance of said work and ditch by the court made impossible; that in any event the said assessments, and the money arising therefrom, will not be needed until said ditch has been completed according to the plans and specifications aforesaid; and the defendant avers that said ditch will not be completed according to said plans and specifications, and will not be acceptable to said court, within the next three years, and will not be so completed and accepted at any time."

It is very difficult to determine upon what definite theory the answer proceeds, or to give it a construction that will make its allegations harmonious and consistent. It will conduce to clearness to state at the outset some general rules by which we must be governed, and after this is done con-

sider the allegations of the answer somewhat in detail, and apply to them the general principles which rule the case.

The second paragraph of the answer must be regarded as in confession and avoidance. If it be regarded as in denial, then, as the general denial was pleaded in the first paragraph, we should be compelled to hold that there was no prejudicial error in sustaining the demurrer even if the answer was good, inasmuch as it is well settled that there is no available error in sustaining a demurrer to a paragraph of an answer in a case where the same evidence is admissible under other paragraphs of the answer which are allowed to stand.

A single paragraph of an answer can not perform a double office, that is, it can not be good as a denial and also as a plea in confession and avoidance. *Cronk* v. *Cole*, 10 Ind. 485; *Kimble* v. *Christie*, 55 Ind. 140; *Woollen* v. *Whitacre*, 73 Ind. 198; *Richardson* v. *Snider*, 72 Ind. 425; *State, ex rel.*, v. *Foulkes*, 94 Ind. 493 (498); *Petty* v. *Trustees, etc.*, 95 Ind. 278; *Nysewander* v. *Lowman*, 124 Ind. 584 (590). The answer before us, if good at all, must be good as a plea in confession and avoidance, and this it can not be unless it overcomes by affirmative allegations the *prima facie* case which it confesses and seeks to avoid. The affirmative allegations are the controlling ones, and those which are equivalent to the denials embraced in the answer of general denial are without influence.

A pleading is to be judged from its general scope and tenor, and not from fragmentary statements or general conclusions cast into it. *Neidefer* v. *Chastain*, 71 Ind. 363; *Lawrence* v. *Beecher*, 116 Ind. 312. The specific allegations are the influential ones to which general statements yield. *Reynolds* v. *Copeland*, 71 Ind. 422; *Keepfer* v. *Force*, 86 Ind. 81; *Spencer* v. *McGonagle*, 107 Ind. 410; *McPheeters* v. *Wright*, 110 Ind. 519; *City of Logansport* v. *McConnell*, 121 Ind. 416 (417). This established and salutary rule of pleading requires us to regard as of no effect some of the

general statements of the answer, for the reason that they are in conflict with the specific averments. The general statement as to the possibilities of the future yield to the specific statements and these show that it is possible to compel the contractor to construct the ditch as the contract requires.

Averments contradicting matters of which judicial knowledge is taken are generally unavailing. *Jones* v. *United States*, 137 U. S. 202; *Jamieson* v. *Indiana Natural Gas, etc., Co.*, 128 Ind. 555 (574). As to the extent of this rule, or the limitations upon it, we need not inquire, since it is enough for our present purpose to give it a very restricted application. This is so, because it is sufficient to employ it for the purpose of denying influence to the conclusion of the pleader that because stakes and lines are obliterated the ditch can not be completed according to the contract, for it is matter of common knowledge that lines once established and once designated by marks can be re-established. The general conclusion is really no more than the unsupported opinion or belief of the pleader, for the specific facts pleaded do not give it support, and it is evident that it can not be supported.

It is well settled that a pleading must proceed upon some definite theory. It is clear that an intelligent issue could never be formed if there were no such rule, and hence the courts have adhered to the rule with strictness. *Mescall* v. *Tully*, 91 Ind. 96 and cases cited; *Toledo, etc., R. R. Co.* v. *Levy*, 127 Ind. 168 (171), and cases cited. We must, therefore, ascertain, if we can, upon what theory this answer proceeds and determine whether it is good upon the theory on which it professes to proceed.

It is exceedingly difficult to determine upon what theory the answer proceeds. Some of the allegations seem to indicate that it proceeds upon the theory that there is no authority to collect the assessment. Among the allegations we find this: "That said commissioner now has in his hands a large sum of money, to wit, more than one hundred dollars,

after paying and adjusting all costs and expenses incident to the establishment of said ditch, which amount of money is more than will be needed by said commissioner, or necessary in the further prosecution of said work, until the cost of construction as provided for in the said contract with the said Henry C. Paul shall become due and payable." This allegation, and those connected with it, seem to indicate that the theory is that there is no authority to collect money to pay for the ditch until it is constructed. These allegations concede that money will be due at some time, and are inconsistent with the allegations which go upon the professed theory that the ditch can never be completed. They are also inconsistent with the allegations indicating that the defence relied on is that the work has not been done according to contract, and will not be done as the contract provides. The principal allegations of the answer seem to require the conclusion that the theory of the pleading is that the work has not been done, and will not be done, according to contract. But yielding the pleader the benefit of all doubt, and conceding, but by no means deciding, that it is proper to embody in a single paragraph of answer several distinct and inconsistent theories, we will examine and decide all the material questions that counsel have argued or presented.

If the answer is to be considered as proceeding upon the theory that the commissioner had no authority to enforce the assessment because the work was not completed, it is clearly bad. The discussion of this point necessarily covers a wide range, inasmuch as it leads us to examine generally the provisions of the statute, to consider the duties and authority of the drainage commissioner, and the rights and liabilities of the land-owners.

The statute invests the drainage commissioner with comprehensive powers. Elliott's Supp., section 1178. Among those principal powers is the power to levy and enforce assessments from time to time as the work progresses. Under the elementary rule that the grant of a principal power car-

ries with it subsidiary powers, such subordinate incidental powers were acquired by the commissioner as were necessary to effectuate the principal power granted. There can, therefore, be no doubt that the commissioner has a reasonable and limited discretion as to when assessments shall be levied and enforced.

A public officer, whose duty it is to conduct or supervise a public work, is presumed to rightfully discharge his duty, and what he does within the scope of his authority is regarded as *prima facie* right, and in accordance with the law. *Linville* v. *State, ex rel.*, 130 Ind. 21; *McCoy* v. *Able*, *post*, p. 417. See, also, authorities cited in Elliott Roads and Streets, pp. 430, 438, notes.

In the absence of a showing to the contrary, it must be presumed that the drainage commissioner did his duty in making the assessment he is here seeking to enforce, for the law, as we have seen, authorizes him to make assessments as the work progresses. It, indeed, goes further, for it provides that expenses of the court and the like may be included in the assessment. This is the clear implication of the language employed by the framers of the statute, for it declares that the commissioner "shall pay costs not otherwise adjudged, and expenses incident to establishing the same, and incurred in preparation of reports, and any expense which the petitioner may have incurred in the preparation or presentation of his petition, and such other expenses as the court shall deem a proper charge upon the funds in the hands of such commissioner, and the damages assessed, and the cost of construction." Elliott's Supp., section 1178. The express words of the statute make it quite clear that an assessment may be made and enforced to pay other expenses than those directly incurred in constructing the ditch. As the commissioner can have no other funds except such as are derived from assessments, it must of necessity follow that when it becomes necessary and proper under the law, to secure funds, he may make an assessment. Where the contrary does

not appear, the courts must assume that there was a valid reason and proper cause for making the assessment.

It follows from what we have said that there was authority to levy the assessment, although the ditch was not fully constructed, and it follows, also, that the answer is bad unless it fully meets the complaint and states facts that make it appear that the drainage commissioner either exceeded his authority or was guilty of a breach of duty.

The statute does not so restrict the authority to levy assessments as to inhibit its exercise until the money is required to pay for work that has been done. We think that the statute considered, as it must be, as an entirety, authorizes the commissioner to exercise a reasonable discretion in levying assessments to secure in advance money to pay for work in progress, but not completed. Provision is made for the execution of a bond by the contractor, and various other provisions are found in the statute indicative of an intention to authorize the commissioner to secure money to pay for the work as it is done. The entire proceeding is, it is important to remember in this connection as well as in another of which we shall presently speak, conducted under the control of a court of superior general jurisdiction, so that the land-owners can at any time apply to the court to restrict or direct its agent. The contract does not preclude the commissioner from levying or collecting assessments. Counsel refer us to the provision of the contract which reads thus: "No part of said work shall be accepted from said Henry C. Paul as completed, until all of such ditch down stream therefrom shall have been completed according to said specifications," and, as we understand them, argue that this precludes the levying of an assessment. We regard the position of counsel as plainly untenable. It may be true that the contractor can not be paid until the work specified is completed as the contract requires, but, granting this to be true, it would by no means follow that the commissioner did not have authority to levy an assessment. Counsel quote

the part of the statute defining the power of the commissioner, which reads as follows: "He shall assess from time to time upon the lands benefited, ratably upon the amount of benefits as adjudged by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract; and he may require the same to be paid in installments, not exceeding twenty per cent. per month, at such times as he shall fix, after thirty days' notice thereof, to be given by personal notice to the owner of such land, or by one publication in a newspaper published in each of the counties in which the lands benefited are situated, stating when and where such payments shall be made." Section 4277, R. S. 1881. But we are unable to perceive that this provision restricts the authority of the commissioner as counsel contend; on the contrary, it seems clear to us that the provision quoted, even if it were segregated from all others, would authorize an assessment to be ratably collected, although the work had not been done which the commissioners proposed to use the money in paying. The law enters into the contract as a silent factor; and if there were doubt upon the question, the effect of the law would remove it by making the contract refer only to payment to the contractor, but the words of the contract are too clear to admit of doubt or require construction. We can not resist the impression that the learned counsel for the appellant have been led into error upon this point by confusing the authority to pay the contractor prior to the completion of the work with the authority to collect an assessment so as to be prepared to pay the contractor when his right to payment accrues.

We fully agree with appellant's counsel that the powers of the drainage commissioner are statutory. He has only such powers as are granted to him expressly or by clear and necessary implication. *Weaver* v. *Templin*, 113 Ind. 298; *Smith* v. *State, ex rel.*, 117 Ind. 167; *Indianapolis, etc., G. R. Co.* v. *State, ex rel.*, 105 Ind. 37; *Fries* v. *Brier*, 111 Ind. 65. But while his powers are strictly statutory, he has, neverthe-

less, a reasonable and limited discretion. In providing in advance the means of paying the contractor when his claim should mature, the commissioner was unquestionably acting within the scope of his authority, and did not abuse the discretion conferred upon him by the statute.

We regard the answer as bad, although it be construed as sufficiently showing that the work was not done, or being done, as the contract required. In affirming this we do not mean to adjudge that the commissioner has authority to permit a material or injurious departure from the contract. We affirm, on the contrary, that he has no such authority. He may, perhaps, in the exercise of a sound and reasonable discretion, permit departures of an immaterial nature, or which can not result to the injury of the land-owners assessed, but he can not authorize a change in the mode of doing the work to the substantial injury of those upon whom the burden of paying for it is cast by law. But it by no means follows that because the duty of the commissioner is to compel the performance of the work in substantial compliance with the contract, his failure to do so will constitute a defence to a suit to enforce an assessment. The land-owner is not without remedy, but his remedy is not by way of defence to the assessment. His remedy is to make application to the court having control of the work, and whose agent the commissioner is, to compel a performance of duty by the contractor and the commissioner. This was expressly decided in the case of *Indianapolis, etc., G. R. Co.* v. *State, ex rel., supra.* In that case it was said: "The remedy is, therefore, to apply to the court, and through its order and intervention secure the due execution of the work." The answer in the case from which we have quoted is very much stronger than the answer in the case before us, for in that case the answer averred that it was impossible to construct the proposed ditch, and stated facts tending to support that averment; and it also averred that the ditch had been abandoned. It is clear, therefore, that we must either directly overrule that case or adjudge

the answer before us to be insufficient. We are, indeed, not required to carry the rule as far as it was carried in that case, for the answer before us is very far from making as strong a defence as was made in the case to which we have referred. Counsel, in speaking of the doctrine of *Indianapolis, etc., G. R. Co.* v. *State, ex rel., supra,* say: "This theory, we think, is clearly answered: 1st. That until the commissioner has done some wrong he could not be called before the court in contempt of its orders. 2d. When the wrong has been done it would be too late." It is obvious that counsel have not succeeded in answering the reasoning of the court in the case referred to. This we say because an order could have been obtained without delay, and the court could have compelled obedience by summary modes. If the appellant had been diligent no loss could have occurred to him or to any other property-owner by reason of a departure from the requirements of the contract.

Our ultimate conclusion is that, whatever view may be taken of the answer, there was no error in holding it bad.

Judgment affirmed.

Filed April 30, 1892.

No. 15,518.

Tyner *v.* The People's Gas Company et al.

Injunction.—*Natural Gas.—"Shooting" Well.—Use of Explosives.*—An injunction will lie to prevent the "shooting" of a gas well and the accumulation of nitro-glycerine for that purpose, when it will endanger the dwelling-house of the plaintiff, and the lives of himself and family.

Same.—*Increasing Flow of Gas.—Adjoining Land-Owner.*—A party has the right to explode nitro-glycerine in his well for the purpose of increasing the flow of gas, and an injunction will not lie to prevent his doing so, on the ground that thereby gas will be drawn from the plaintiff's land into the defendant's well.

PLEADING.—*Complaint.*—*Construction of.*—*What Court Will Look to.*—In construing a complaint, and in determining the rights of the parties thereunder the court will look to the nature of the acts alleged, and if such acts are lawful within themselves, the use of such epithets as "unlawfully," "maliciously" and "wantonly," in the complaint, can not make them unlawful.

From the Hancock Circuit Court.

D. S. Gooding, for appellant.

J. A. New, *C. G. Offutt* and *R. A. Black*, for appellees.

COFFEY, J.—The complaint in this case consisted of three paragraphs. The appellant withdrew the second paragraph and the court sustained a demurrer to the first and third. The appellant refusing to amend the appellees had judgment.

The assignment of error calls in question the ruling of the court in sustaining the demurrer to the first and third paragraphs of the complaint.

The first paragraph alleges, in brief, that the appellant and the appellees are the owners of adjoining city lots in the city of Greenfield, Indiana, situate near the center of the city; that the family residence of the appellant, in which he and his family reside, is located on the lots so owned by him; that the appellees, regardless of the rights of the appellant, and of the safety, peace, comfort and lives of himself and family, without his consent, and over his objection, have dug and constructed a natural gas well to the depth of about one thousand feet, two hundred feet distant from appellant's said residence, and within forty-three feet of the appellant's lots; that appellees threaten and are about to "shoot" said well and will do so unless restrained therefrom; that for this purpose they have unlawfully brought into the city of Greenfield a large quantity of nitro-glycerine or other nitro-explosive compound, and have permitted the same to remain within two hundred feet of appellant's said residence for three hours at a time, in the midst of and surrounded by a large number of people; that they threaten to

"shoot" said well with their said nitro-glycerine, and will do so unless restrained and enjoined therefrom; that nitro-glycerine is highly explosive and is very dangerous to life and property, and is liable to explode under any and all circumstances; that an explosion of sixty or one hundred quarts thereof at any given place on the surface of the earth could and probably would destroy life and property anywhere within five hundred yards of such explosion; that the handling or storing thereof in or about the appellees' gas well will endanger the lives of the appellant and his family as well as his property, and that the explosion thereof within the well will greatly injure the property of the appellant, both above and below the surface of the earth, and endanger the life of himself and family.

The third paragraph alleges, substantially, that under the land of the appellant, described in the first paragraph of the complaint, at a depth of nine hundred or one thousand feet, are many valuable stones and rocks, among others, the rock known as "Trenton rock," containing great quantities of natural gas of the value of $4,000; that said natural gas, prior to August, 1889, was imbedded, contained, held and securely kept in said "Trenton rock;" that on the 19th day of August, 1889, the appellants unlawfully and maliciously dug and constructed a natural gas well to the depth of one-thousand feet within twenty-five feet of appellant's lots, and on the — day of September, 1889, unlawfully and maliciously intending to injure and damage the appellant and his property, unlawfully, wantonly and maliciously performed the act of "shooting" their gas well to the great damage of the appellant; that the appellees at the time they sunk their well, intended, by means thereof, to draw and cause to flow large quantities of natural gas from appellant's said "Trenton rock" into their well, and that large quantities of said gas did flow into their said well from August until December, 1889; that in September of that year appellees unlawfully and maliciously, and over appellant's objection, with the in-

tent to obtain and convert to their own use a larger flow of appellant's gas, and to cause the same to flow into their well, and thereby enable them to sell the same to their customers, did "shoot" their said well, and thereby opened the crevices and fissures in said "Trenton rock" for a distance of two hundred feet in all directions from their well, and thereby caused a large quantity of appellant's gas to escape from said rock and flow into said well continuously ever since, by means of which they have possessed themselves of appellant's gas, and sold the same to their customers, to appellant's damage in the sum of two thousand dollars; that the appellees threaten to continue to extract from appellant's land the gas thereunder, and convert the same to their own use to the irréparable damage of the appellant, and for which the law affords no adequate remedy in damages.

We regret that we have not been furnished a brief by the appellees in this case, and that we are unadvised, by them, of the ground upon which the circuit court made its rulings.

In our opinion the court erred in sustaining a demurrer to the first paragraph of the complaint. It is true that many allegations are found therein which might have been omitted, but still the distinct allegations are these, that by shooting appellees' well, and the accumulation of nitro-glycerine for that purpose, the appellant's dwelling and the life of himself and family will be endangered.

This is admitted by the demurrer, and if such is the fact the appellees should be enjoined from "shooting" their well.

One of the well-known exceptions to the rule that the owner may use his property as he thinks best, is that he must so use it as to cause no unnecessary injury to others. "A private nuisance of the sort which is redressed at the suit of the party, is anything done on one's premises or elsewhere, or put into circulation, or omitted to be done contrary to a legal duty, wherefrom, through the separate action of nature or of the common cause of events, an injury follows

to or directly menaces another." Am. and Eng. Encyc. of Law, title, "Nuisance;" Bishop Non-Contract Law, section 411.

It is settled by our own decisions that the erection or maintaining of anything that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, constitutes a private nuisance. *Ohio, etc., R. W. Co.* v. *Simon*, 40 Ind. 278; *Haag* v. *Board, etc.*, 60 Ind. 511; *Owen* v. *Phillips*, 73 Ind. 284; *Williamson* v. *Yingling*, 93 Ind. 42.

To live in constant apprehension of death from the explosion of nitro-glycerine is certainly an interference with the comfortable enjoyment of life.

Injunction is the proper remedy for an injury of this kind. *Smith* v. *Fitzgerald*, 24 Ind. 316; *Reichert* v. *Geers*, 98 Ind. 73.

We do not think the court erred in sustaining a demurrer to the third paragraph of the complaint. The use of the words "unlawfully," "maliciously" and "wantonly" add no force to the complaint. In construing the complaint, and in determining the rights of the parties thereunder, we will look to the nature of the acts alleged, and if such acts are lawful within themselves, such epithets can not make them unlawful.

That the appellees had the right to explode nitro-glycerine in their well for the purpose of increasing the flow of gas, was settled by the case of *People's Gas Co.* v. *Tyner*, *ante*, p. 277.

The question needs no further elaboration here.

Judgment reversed, with directions to overrule the demurrer to the first paragraph of the complaint.

Filed April 30, 1892.

No. 15,720.

131 412
150 342

The Lake Erie and Western Railroad Company v. Priest et al.

Covenant.—*To Maintain Crossing, Cattle-guards, etc.—Obligation to Perform by Purchaser at Foreclosure Sale.—Right of Way.—Railroad.*—A provision in a deed of land to a railroad company for a right of way, requiring the grantee to maintain a fence on each side of said right of way, and to put in and maintain a farm crossing and cattle-guards, is a covenant running with the land. It is binding on the grantee and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed. While equity will apply the mortgage to the after-acquired title, it can only affect such right and such title as the grantee and mortgagor actually acquire. If the title comes to him, as in this case, burdened with covenants, the mortgagee, while availing himself of the security, must take the title as it is, with its burdens.

Parties.—*Covenant Running with Land.—Action to Enforce.—Wife Proper Party Plaintiff.*—A wife's interest in the lands of her husband has been so enlarged by section 2508, R. S. 1881, that while she may not be a necessary party plaintiff, she is nevertheless a proper party plaintiff with her husband in an action to compel a railroad company to maintain a crossing over its right of way, and to maintain cattle-guards, fences, etc., in accordance with a provision in a deed, by the husband and wife of the land, for the right of way.

From the Delaware Circuit Court.

R. S. Gregory and *A. C. Silverburg*, for appellant.

W. W. Orr, for appellees.

McBride, J.—October 16th, 1879, the appellees, who are husband and wife, executed to the Lake Erie and Western Railway Company a deed, conveying a strip of land for right of way across lands then and still owned in fee simple by the husband.

The deed contained the following recital as to consideration:

"For and in consideration of the construction of the railway of the company hereinafter named, and the sum of one hundred and fifty-six and $\frac{15}{100}$ dollars to them in hand paid by the Lake Erie and Western Railway Company."

Immediately following the description of the land was the following:

"Provided, that said railway company shall, within one year from and after the completion of said railway, erect, and thereafter maintain a good, substantial fence on each side of said right of way; shall put in, and thereafter maintain, one farm crossing, with cattle-guards on each side, at a point designated by me during the building of said railway; also, all necessary and proper cattle-guards at road crossings and outside lines." Following this is the usual habendum clause, with full covenants of warranty.

The complaint avers acceptance of the deed by the grantee, and that it thereafter entered into possession of the land conveyed, and in the year 1880 constructed a line of railway across the same; that it also, after the construction of its railway, in compliance with the conditions of the deed, constructed the farm crossing, cattle-guards, fences, etc., required by the proviso in said deed, and, thereafter, while it remained the owner of said railway, maintained them; that the land over which the same passes is a farm, and that the line of railway cuts off from the remainder of the farm, and from the dwelling and out-buildings thereon, twenty acres of land which can only be reached by passing over said railway; that the appellant is the successor to said grantee in the ownership of said railway, having succeeded to its title, rights and privileges by purchase and conveyance from and through said grantee, and has held the same and operated the said railway for more than four years; that in disregard of the appellee's rights, and of its duties under said conveyance, it has removed the farm crossing, cattle-guards, fences, etc., and refuses to restore them, and deprives the appellee of the use and benefits of the same.

The complaint contains averments showing special damages occasioned by this conduct of the appellant, and seeks to recover damage and a decree for the specific performance of the conditions of the deed by the restoration and con-

tinued maintenance of the crossing, cattle-guards, fences, etc. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was overruled. The principal controversy in the case is over the construction to be given to the proviso above quoted, contained in the deed conveying the right of way. A construction of that proviso, with a determination of the rights and liabilities growing out of it, will be decisive of every material question, but one, presented by the record. A special answer filed by the appellant discloses the following additional facts bearing on the controversy:

The grantee in the deed, before the deed was executed, mortgaged all its rights in its right of way, and other property, to the Central Trust Company of New York. The mortgage covered such interest as the grantee then had in the land conveyed by the appellees. It is averred that the appellees executed the deed in question with full knowledge of the mortgage. The mortgage was afterward foreclosed, and the property was duly sold at foreclosure sale, one Samuel Thomas becoming the purchaser. The appellant derives its title by conveyance from Thomas, and the grantee has no interest whatever therein. It does not appear that the appellees were either of them parties to the foreclosure proceedings. It is averred that the appellant bought without knowledge of any agreement, liability or obligation for the maintenance of the cattle-guard, farm crossing, etc. A demurrer to this special answer was sustained. Counsel have discussed the questions raised by both rulings together, with the evident purpose of thereby eliciting full consideration of the one question already suggested.

The contention of the appellant is that the proviso in the deed creates no charge upon the land that runs with the title, and that, whatever may have been the duties and obligations thereby imposed upon the grantee, the land came to the appellant freed from any duty or burden for the maintenance of cattle-guards, crossing, fences, etc.

We are unable to see wherein the question here presented differs in any material particular from that which was fully and exhaustively considered in the case of *Midland R. W. Co.* v. *Fisher*, 125 Ind. 19. In view of the full and careful consideration given to that case any elaboration here is unnecessary. In our opinion the stipulations contained in the proviso must be considered as forming a material part of the consideration for the conveyance. The acceptance of the deed imposed a burden upon the land which was not only binding upon the original grantee, but runs with the title, and is equally binding upon all who claim through the original grantee.

The fact that the mortgage was executed before the deed was made could not operate to give the mortgagee, or those claiming under it, any rights superior to the rights of the appellees, the grantors. When the mortgage was executed the mortgagor had no title to the land.

The mortgage would, however, in equity attach to the subsequently acquired title. So that, as between the mortgagor and the mortgagee, their relative rights are substantially as they would have been if the mortgagor had held title when the mortgage was made. Jones Mort., section 153.

In such case, while equity will apply the mortgage to the after acquired title, it can only affect such right and such title as the grantee and mortgagor actually acquires. If the title comes to him, as in this case, burdened with covenants, the mortgagee, while availing himself of the security, must take the title as it is, with its burdens.

The appellant also insists that the demurrer to the complaint should have been sustained on the ground that it does not show a right of action in all of the plaintiffs. The rule is as stated by the appellant, that a complaint must be good as to all of the plaintiffs, or it is not good as to any, and if the facts pleaded show that one or more of the parties joined as plaintiffs has no interest in the controversy, a demurrer on the ground that it does not state facts sufficient to constitute

a good cause of action should be sustained. The complaint, to be good, must show a joint interest and cause of action in all of the plaintiffs. *Holzman* v. *Hibben*, 100 Ind. 338, and cases cited. *Peters* v. *Guthrie*, 119 Ind. 44.

We think, however, that the facts pleaded do show such joint interest of the plaintiffs in the cause of action as authorizes them to join in the action.

A wife's interest in the lands of her husband, while still an inchoate interest, has been greatly enlarged. Her common law right of dower has been enlarged into a fee, which is not simply contingent upon the husband's death, but may at any time become vested and absolute upon a judicial sale of the land, where her inchoate interest is not directed by the judgment to be barred or sold. Section 2508, R. S. 1881.

While we do not think she is a necessary party in such cases, in our opinion she has such interest as makes her a proper party plaintiff.

A question of evidence is discussed which we do not deem it necessary to consider in view of certain well settled rules.

We find no error in the record.

Judgment affirmed, with costs.

Filed April 29, 1892.

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No. 15,118.

McCoy *v.* Able et al.

Practice.—*Motion to Dismiss Appeal.—Bill of Exceptions.*—Unless the motion to dismiss an appeal from a board of county commissioners is incorporated in a bill of exceptions, no question of the lower court's ruling thereon is presented on appeal to the Supreme Court.

Same.—*Objection to Jurisdiction.*—An objection that the court has no jurisdiction of the subject-matter may be interposed at any time, and such objection needs for its exhibition neither a formal motion nor a bill of exceptions.

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JURISDICTION.—Jurisdiction of the subject-matter means jurisdiction of the class of cases to which the particular case, in which the question is raised, belongs.

BILL OF EXCEPTIONS.—*Time of Presentation Controls.*—The time of the presentation of the bill of exceptions to the judge, if shown in the body of the instrument, controls, and not the date of filing in the clerk's office.

SAME.—*Swearing Stenographer.*—A stenographer need not be sworn where the court accepts and adopts his report of the evidence.

SAME.—*Judicial Act.—Delegating.*—The settlement and granting of a bill of exceptions is a judicial act which can not be delegated.

SAME.—It is immaterial who takes down and writes out the evidence, if the trial judge sanctions and accepts the statement thereof and adopts it as his own judicial act.

SAME.—*Long-Hand Manuscript.—Incorporation in Bill of Exceptions Necessary.*—The stenographer's report of the evidence can not be made part of the bill of exceptions in any other mode than by incorporation in the bill.

SAME.—*Certifying up Bill of Exceptions Containing Long-Hand Manuscript.*—The better practice on appeal to the Supreme Court is for the clerk of the lower court to certify up the original bill of exceptions containing the long-hand manuscript, and not a copy of such bill.

SAME.—*Copying Bill of Exceptions.—What Must be.*—All bills of exceptions, except those containing the long-hand manuscript of the evidence, must be copied by the clerk.

SAME.—*What May not be Inserted in Long-Hand Manuscript.—Copying.*—If anything else than the report of the evidence and the matters directly and properly pertaining thereto is incorporated in the long-hand manuscript notes of the evidence, the clerk must copy such manuscript and bill of exceptions, and can not certify the original up to the Supreme Court.

GRAVEL ROAD.—*Estimate of Engineer.*—The estimate of the engineer on a gravel road is *prima facie* correct, and the burden is on the person attacking it to show fraud or mistake. Such an estimate is not conclusive, and can not be so made by agreement of the parties in advance.

SAME.—*Contract.—Conclusiveness of Action of Board of Commissioners.—Collateral Attack.*—As to the nature of the contract and like matters, the decision of the board of county commissioners is conclusive as to all persons who come in after the work has been done on the contract to the satisfaction of such board and the engineer, and seek to defeat a recovery by the contractor. Such persons can not go behind the contract, for that is a collateral attack.

SAME.—*Estoppel.—Standing By.*—Property-owners who stand by inactive and passive until after the work is done can not come in and defeat a recovery by the contractor for the value of his work and materials furnished.

From the Blackford Circuit Court.

D. T. Taylor and *R. H. Hartford*, for appellant.

J. W. Headington, *J. F. La Follette*, *W. H. Williamson*, *C. E. Walters* and *W. A. Thompson*, for appellees.

Elliott, C. J.—In March, 1886, a petition for the construction of a free gravel road was presented to the board of commissioners of Jay county. The board ordered the construction of the road, and awarded the contract for its construction to the appellant. He constructed the road, and the board accepted it. During the progress of the work partial estimates were issued to him, and upon its completion the engineer issued to him a final estimate. The contract assumes to provide, and does in terms provide, that the estimates of the engineer shall be conclusive. After the completion and acceptance of the work, the contractor presented his claim to the board for the sum due him as evidenced by the estimate issued to him by the engineer. The board allowed the claim. The case went by appeal to the circuit court, and, finally, by change of venue, went to the Blackford Circuit Court. That court sustained the appellees, thus vacating the allowance made by the board of commissioners upon the estimate of the engineer.

The appellant unsuccessfully moved to dismiss the appeal. There is no bill of exceptions containing the motion or exhibiting the ruling thereon, and we can not regard the question as before us for review. *Crumley* v. *Hickman*, 92 Ind. 388; *Yost* v. *Conroy*, 92 Ind. 464, and cases cited; *Board, etc.*, v. *Montgomery*, 109 Ind. 69.

In deciding, as we do, that there is no question presented because the motion to dismiss is not in the record, we are not unmindful of the fundamental doctrine that the objection that there is no jurisdiction of the subject-matter may be interposed at any time. We affirm that doctrine, and declare that such an objection needs for its exhibition neither formal motion nor bill. But we deny that the doctrine has any ap-

plication to this case. There was here jurisdiction of the general subject, that is, of the general class of cases to which the particular case belongs, and where such jurisdiction exists specific objections to the jurisdiction must be opportunely made and duly brought into the record. "By jurisdiction of the subject-matter," said the court in *Chicago, etc., R. R. Co.* v. *Sutton*, 130 Ind. 405, "is meant jurisdiction of the class of cases to which the particular case belongs." *Jackson* v. *Smith*, 120 Ind. 520 (522); *State, ex rel.*, v. *Wolever*, 127 Ind. 306 (315); *Alexander* v. *Gill*, 130 Ind. 485; *Yates* v. *Lansing*, 5 Johns. 282.

The decision in *Wilson* v. *Wheeler*, 125 Ind. 173, is not in point. In that case the motion to dismiss was sustained, and as the presumption is in favor of the trial court, it was rightly declared that the inference should be that the proper bond and affidavit were not filed. In *Robinson* v. *Board, etc.*, 37 Ind. 333, and *Alexander* v. *McCordsville, etc., Co.*, 44 Ind. 436, bills of exceptions were filed.

It is not shown by the record that there was any error or any abuse of discretion in permitting the appellees to file an answer in the circuit court. We must, therefore, presume that there was no error in the action of the court.

The appellees strenuously contend that the evidence is not in the record. One of the reasons adduced in support of this contention is that the bill was not filed within the time fixed by the order of the court. The cases cited by counsel decided under the statute in force prior to the revision of 1881, are uninfluential. As the law now stands the time of the filing is not of controlling importance, for the presentation of the bill to the judge, if shown in the body of the instrument, controls the question. It is still true that the bill must be filed. *Hormann* v. *Hartmetz*, 128 Ind. 353. But the time is not always of controlling importance, inasmuch as the presentation of the bill to the judge is the act which gives effect to the bill when it is signed and filed. *Vincennes, etc., Co.* v. *White*, 124 Ind. 376; *Robinson* v. *Anderson*, 106 Ind. 152; *Ohio, etc., R. W. Co.* v. *Cosby*, 107 Ind. 32; *Terre*

Haute, etc., R. R. Co. v. *Bissell,* 108 Ind. 113. The decision in *La Rose* v. *Logansport, etc., Bank,* 102 Ind. 332, was in some respects erroneous, as shown and adjudged in *Robinson* v. *Anderson, supra,* and *Terre Haute, etc., R. R. Co.* v. *Bissell, supra.* As the bill before us shows, on its face, that it was presented to the judge in due time, the fact that it was not filed until some time afterwards does not impair its force.

It is contended that, as the record does not show that the stenographer was appointed or sworn, the evidence is not in the record. This position is untenable. The settlement and granting of a bill of exceptions is a judicial duty. *Seymour, etc., Co.* v. *Brodhecker,* 130 Ind. 389, and authorities cited. As the duty is judicial it can not be delegated. It is, indeed, probably true that even the Legislature can not impose that duty upon any person other than a judicial officer. But the mere clerical work of taking down the evidence and writing it out may be done by counsel, by a stenographer, or by any one else. If the judge who tries the case sanctions and accepts the statement of the evidence, he thereby adopts it as his own judicial act, and as such it comes to this court. *Bradway* v. *Waddell,* 95 Ind. 170; *Stagg* v. *Compton,* 81 Ind. 171; *McCormick, etc., Co.* v. *Gray,* 114 Ind. 340; *L'Hommedieu* v. *Cincinnati, etc., Co.,* 120 Ind. 435 (436).

It is settled beyond controversy that the stenographer's report can not be made part of the bill of exceptions in any other mode than by incorporation. *Patterson* v. *Churchman,* 122 Ind. 379, and cases cited; *Clark* v. *State, ex rel.,* 125 Ind. 1; *Fiscus* v. *Turner,* 125 Ind. 46; *Dick* v. *Mullins,* 128 Ind. 365, and cases cited; *Morningstar* v. *Musser,* 129 Ind. 470. But when it is incorporated in the bill of exceptions in the mode pointed out in *Wagoner* v. *Wilson,* 108 Ind. 210, it is there by the act of the judge, and will be considered as fully and effectively in the record.

In this instance the long-hand manuscript of the reporter is preceded by the proper and usual recitals of a bill of exceptions, and the usual formula: "And this was all the

evidence given in the cause," is written in the bill, as are, also, the date of the presentation to the judge and the appropriate conclusion. To the bill thus prepared is affixed the signature of the judge. The course adopted was a proper one, and the evidence as taken down and transcribed by the reporter is in the bill of exceptions.

A further contention of the appellees' counsel is that the clerk can not certify to us the original bill of exceptions containing the reporter's long-hand manuscript. We are referred to the case of *Hull* v. *Louth*, 109 Ind. 315, where it was said that the long-hand manuscript may be taken from the bill of exceptions and certified up, without copying, by the clerk. In our judgment the practice adopted in this case is preferable to that suggested in *Hull* v. *Louth*, *supra*. We adjudge the better rule to be this: Where a bill of exceptions upon a ruling denying a new trial is taken for the purpose of getting the stenographer's report of the evidence, with its incidents, into the record, the original bill may be certified up to this court as part of the record. All there is of such a bill, besides the report of the evidence, is composed of formal parts and brief recitals, so that little would be left to be copied if the report of the evidence were taken out. Confusion is avoided by sending up the bill without detaching the evidence, and only a very little matter outside of the report of the evidence comes up in its original condition. It is much more consistent with principle, and much safer to require the entire original bill to be certified, than it is to devolve upon the clerk the duty of determining what shall be left in and what taken out. The rule we here declare enables parties to get the long-hand manuscript into the record without incurring the useless expense of having it copied, prevents confusion in the record and gives fair and reasonable effect to the statute concerning official short-hand reporters. But the rule we declare does not have, and can not be made to have, any application to any other bills of exceptions except such as are prepared for the purpose of

bringing into the record the long-hand manuscript of the official reporter and its necessary incidents. All other bills of exceptions must be copied by the clerk. Nor can the rule apply to a bill of exceptions wherein other matters than the long-hand report and matters legitimately connected therewith are sought to be brought into the record. In order to come within the rule stated, the bill of exceptions must be confined to the single office of exhibiting the report of the evidence and the matters directly and properly pertaining thereto.

The first question presented by the specification of error founded upon the ruling denying a new trial is as to the effect of the estimates of the engineer and the acceptance of the board of commissioners. We can not agree with counsel that the engineer's estimate is conclusive, for we understand it to be settled by our decisions that parties can not, by an agreement in advance, oust the jurisdiction of the courts and make conclusive the estimate of an engineer or other person. *Kistler* v. *Indianapolis, etc., R. R. Co.*, 88 Ind. 460; *Bauer* v. *Samson Lodge, etc.*, 102 Ind. 262 (269); *Louisville, etc., R. W. Co.* v. *Donnegan*, 111 Ind. 179; *Supreme Council, etc.*, v. *Garrigus*, 104 Ind. 133 (54 Am. Dec. 298); *Supreme Council, etc.*, v. *Forsinger*, 125 Ind. 52 (55).

The doctrine of our court is well sustained by authority. *Dugan* v. *Thomas*, 79 Me. 221; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Scott* v. *Avery*, 5 H. L. Cases, 811; *Thompson* v. *Charnock*, 8 Term R. 139; *Reed* v. *Washington, etc., Ins. Co.*, 138 Mass. 572; *Stephenson* v. *Piscataqua, etc., Co.*, 54 Me. 55; *Starkey* v. *De Graff*, 22 Minn. 431. But while we do not regard the estimate as conclusive, we do regard it as *prima facie* correct. *Linville* v. *State, ex rel.*, 130 Ind. 210. Authorities cited in Elliott Roads and Streets, pp. 430, 438, notes. As the estimate of the engineer is *prima facie* correct, the burden was upon the appellees to show fraud or mistake. This they might have done either by direct or by circumstantial evidence. The question, therefore, is, whether the appel-

lees did show by competent evidence that there was fraud or mistake.

It is implied in our statement that only such matters as are open to controversy can be considered in such a case as this, for up to a given point the judgment of the board of commissioners is conclusive. *Board, etc.*, v. *Hall*, 70 Ind. 469; *Hill* v. *Probst*, 120 Ind. 528; *Reynolds* v. *Faris*, 80 Ind. 14; *Hilton* v. *Mason*, 92 Ind. 157; *Streib* v. *Cox*, 111 Ind. 299 (305), and cases cited; *Board, etc.*, v. *Montgomery*, 106 Ind. 517 (521), and cases cited. The cases to which we have referred, and to which many more might easily be added, leave no room to doubt that,as to the nature of the contract and like matters,the decision of the board is conclusive as to persons who come in after the work has been done under the contract to the satisfaction of the board and the engineer, and seek to defeat a recovery by the contractor. The doctrine of the cases to which we refer is in harmony with the just and equitable principle which precludes a party from coming in and assailing the validity of a contract after the work has been done. *Taber* v. *Ferguson*, 109 Ind. 227; *Peters* v. *Griffee*, 108 Ind. 121; *City of Logansport* v. *Uhl*, 99 Ind. 531; *City of Evansville* v. *Pfisterer*, 34 Ind. 36; Elliott Roads and Streets, pp. 421, 423, notes. In so far as concerns the effort to get behind the approval of the contract and incidental matters, this proceeding is in the strict sense a collateral one. To the extent that it is collateral it can not prevail, since the action of the board of commissioners is conclusive. *Million* v. *Board, etc.*, 89 Ind. 5; *Montgomery* v. *Wasem*, 116 Ind. 343 (347), and authorities cited; *Prezinger* v. *Harness*, 114 Ind. 491; *Adams* v. *Harrington*, 114 Ind. 66; *Hackett* v. *State, etc.*, 113 Ind. 532; *Ely* v. *Board, etc.*, 112 Ind. 361. The only general question open to controversy is, as we have substantially said, as to whether there was fraud or mistake on the part of the board or the engineer. It certainly can not be adjudged that any question back of that remains open, since

to hold that any such question is open would be to disregard the decision of the board, and that can not be done without overturning a long line of decisions.

We have studied the evidence, and are satisfied that the case was tried on a radically erroneous theory, and that, as usually happens where a wrong theory is adopted, the trial court was led to a wrong result. We do not think that the evidence overcomes the *prima facie* case made by the estimate of the engineer and the acceptance of the board.

Judgment reversed.

Filed March 9, 1892.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—It is claimed by counsel in their argument on the petition for a rehearing, that the evidence shows that the engineer made a mistake in accepting and estimating the work done by the appellant in constructing the gravel road described in the record.

The contract submitted many things to the discretion and judgment of the engineer, and if the contract was not as definite and certain as the law requires, the appellees ought to have made that question before the work was completed. Principle and authority forbid that property-owners should be allowed to stand by, inactive and passive, until after the work has been done, and then come in and take from a contractor the value of his work and materials without compensation. For such persons the law has no very tender regard. They ought to move promptly, and not wait until the contractor has expended time and money under the directions and requirements of the board of commissioners and its engineer. As the contractor in this instance has obeyed the orders of the proper officers, has followed the construction placed upon the contract by them, and has fully completed his work, the appellees are estopped from questioning his right to compensation upon the ground that the contract did not conform to the law. *City of Evansville* v. *Pfisterer*, 34

Ind. 36; *Jackson* v. *Smith,* 120 Ind. 520; *Montgomery* v. *Wasem,* 116 Ind. 343; *City of Logansport* v. *Uhl,* 99 Ind. 531; *Stewart* v. *Board, etc.,* 45 Kan. 708 (23 Am. St. Rep. 746). See authorities cited in Elliott Roads and Streets, p. 287, note 3; p. 420, note 1; p. 421, note 1. The only question open to contest in this case was whether there was fraud or mistake on the part of the engineer in estimating and accepting the work, for the question whether he properly exercised his judgment or discretion is not open to investigation. It is probably true that an abuse of discretion may be some evidence of fraud, but here there is no abuse of discretion shown. The evidence does not show any mistake of fact, for a mere error of judgment or discretion, where the discretion is not transcended, is not such a mistake. *Linville* v. *State, ex rel.,* 130 Ind. 210. The evidence, as it appears in the record, does not overcome the *prima facie* effect of the engineer's estimate and acceptance.

Petition overruled.

Filed May 19, 1892.

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No. 14,484.

Cleveland, Cincinnati, Columbus and Indianapolis Railway Company *v.* Harrington.

Negligence.—*When Question of Contributory Negligence is for Jury.*—Where the circumstances of a particular case are such as to warrant different inferences, so that one impartial and sensible man may draw the inference and conclusion that the injured person was guilty of contributory negligence, while another man, equally impartial and sensible, may draw a different conclusion, the court will not decide as a matter of law the question of contributory negligence, but will leave it to the jury under proper instructions.

Railroads.—*Rate of Speed.*—A railway company may not run its trains in a populous city at the same rapid rate of speed it may in the coun-

try and escape liability on the ground that it may run such trains at any rate of speed it chooses.

SAME.—*Ordinance Regulating the Speed of Trains, Validity of.*—An ordinance of a city requiring all trains within the limits to be run at a speed not over four miles an hour, if its enactment is authorized by a statute, is valid, and evidence will not be heard that such ordinance is unreasonable, and therefore void.

SAME.—*Failure to Enforce Ordinance.*—A railway company violating an ordinance by running its trains at a rate faster than is allowed by the terms of such ordinance, can not set up as a defense that the officers and citizens of the city have never enforced such ordinance, although it has been enacted many years before.

SAME.—*Person Approaching Track, When Should Look for Coming Trains.*—The court will not undertake to say to the jury just how many feet from a railroad track a person approaching a crossing should look for approaching trains before attempting to cross such track, but will leave that question to the jury.

SAME.—*Requirement of Person Approaching Crossing.*—All the law requires of a person about to cross a railroad track at a public highway, is to use ordinary care to avoid injury.

SAME.—*Company Organized Under Special Charter.*—*No Right to Regulate Speed in Cities or Towns Reserved.*—The speed of the trains of a railway company organized under a special law of the State may be regulated by a municipal ordinance enacted in pursuance of a general statute, although no reservation to regulate the speed of such company's trains is inserted in such special charter.

CONSTITUTIONAL LAW.—*Police Power.*—*State Depriving Itself of Right to Exercise.*—A State can not deprive itself of the right to exercise the police power, and such an attempt, if made, is only a mere license, which may be revoked.

From the Marion Superior Court.

H. H. Poppleton, A. C. Harris, W. H. Calkins and *J. T. Dye*, for appellants.

B. Harrison, W. H. H. Miller and *J. B. Elam* for appellee.

COFFEY, J.—This was an action by the appellee, in the Marion Superior Court, against the appellant, to recover damages occasioned by a personal injury.

The injury on account of which damages are claimed occurred in the city of Indianapolis at a point where the appellant's railroad tracks cross Ohio street. The complaint alleges substantially, among other things, that the train

which inflicted the injury for which suit was brought was negligently run at a high and dangerous rate of speed in violation of a city ordinance, and without ringing the bell. It also contains the usual allegation that the appellee was without fault or negligence on her part.

A trial of the cause, at special term of the superior court, resulted in a verdict for appellee, upon which the court rendered judgment over a motion for a new trial. Upon appeal to the general term the judgment at special term was affirmed, from which this appeal is prosecuted.

It is insisted here that the judgment of the superior court should be reversed, because:

First. The undisputed facts in the case do not prove that the appellee was without negligence on her part.

Second. The instructions given by the court do not state the law of the case properly or correctly.

Third. The court erred in refusing to permit the appellant to prove that the ordinance of the city of Indianapolis regulating the speed of trains within the corporate limits of the city was unreasonable and void.

The facts in the case necessary to understand the questions presented for our decision, are substantially as follows: Ohio street, in the city of Indianapolis, runs east and west, is sixty feet wide, and at the point where the accident in question occurred, has an improved roadway in the center, and sidewalks on either side. It is much travelled, both by persons on foot and in vehicles. The appellant's railroad crosses it at an acute angle, its course being from northeast to southwest. North of Ohio street the railway track curves toward the north, there being two or more curves, varying in degree, until it finally takes an almost due north course until it reaches what is known as the Massachusetts avenue station. Southwest of the Ohio street crossing, and in the direction of the Union station, the railway track curves towards the west until it attains an almost due west course at the station.

Very much of this curvature occurs in the immediate vi-

cinity of the Ohio street crossing. At the point where the accident occurred there are four railway tracks crossing Ohio street, near together, and substantially parallel with each other. In travelling west on Ohio street the first track reached at the crossing is known as the Indianapolis, Bloomington and Western Railway track. This track, at the time of the accident, was owned and used exclusively by the Indianapolis, Bloomington and Western Railway Company. The track immediately west of this was used by the appellant and other railroad companies, and was known as the "down main," being the main track by which trains passed from Massachusetts avenue station to the Union station. The track next immediately west was called the "up main," being used by the appellant, and other railroad companies, in running trains from the Union station to Massachusetts avenue station. The next was a siding owned by the appellant and constituted the westerly track of the group.

Just south of Ohio street is a short siding connecting the "up main" with the "down main." A short distance east of this group of tracks a small stream, known as Pogue's Run, crosses Ohio street, and for some distance northeast of the street the general course of the stream is parallel with the railroad above described and not far from it. On this side the railroad tracks there are but few buildings near them. In walking west on Ohio street, when at a point near the bridge over Pogue's Run, the traveller has a comparatively unobstructed view of the railroad tracks to the northwest. The view in this direction, after passing a structure known as Branham's coal yard, near Pogue's Run bridge, has no obstruction until after the tracks are passed. At the time of the accident the south side of Ohio street, as well as the whole region between the railroad tracks and Pogue's Run, in the direction of the Union station, was well covered with buildings and other structures. On the south side of this street, and abutting immediately upon it, there was a large lumber yard enclosed by a high tight fence,

which, with other structures, occupied the space west of Pine street, running north and south to a point about eight feet east of the I., B. & W. track.

At the time of injury of which complaint is made, the appellee was about forty years of age, in good health, with the senses of sight and hearing unimpaired. On the morning of the 13th day of April, 1886, about 7 o'clock, she started from her home, east of the Ohio street crossing, to Market, and walked west on the south side of Ohio street at a moderate gait. The morning was bright and no wind was blowing.

As she approached the railway crossing a freight train, composed of from ten to fifteen cars, with engine and caboose attached, was moving north on the "up main" at the speed of about four miles an hour, the rear of the train being near the crossing at the time she reached it. The train was making the noise usually made by moving trains, the engine was ringing the bell and the steam was escaping from the dome. The noise made by this train was such as rendered it difficult, if not impossible, to hear or to distinguish the noise of other approaching trains. The appellant, when eighty or ninety feet east of the "down main," could see north up the track a distance of eight hundred feet. At that point she looked and saw no approaching train. When at the east side of the first track, which is thirty-seven feet west of the "down main," she was able to see north up the track for a distance of four hundred feet. She again looked and saw no approaching train. She then crossed the first track and turned her attention to the southwest to look for approaching trains from that direction, but as she attempted to cross the "down main" one of the appellant's engines, approaching from the north, struck her, inflicting serious injuries.

The engine which collided with her was drawing a passenger train, and was running at the speed of eighteen or twenty miles an hour on the "down main," and was not ringing the

bell. At the time of the accident there was an ordinance of the city of Indianapolis, in force, which prohibited the running of engines, within the corporate limits of the city, at a greater rate of speed than four miles an hour.

The appellee was familiar with the crossing, having passed over it frequently.

It is contended by the appellant that these facts and circumstances make a case in which the court is bound to adjudge, as matter of law, that the appellee was guilty of such contributory negligence as precludes her from recovering in this action, while on the other hand it is contended by the appellee that they make a case where the question of contributory negligence should be left to the jury, under proper instructions from the court.

It is not disputed or denied that the facts make such a case of negligence on the part of the appellant's employees as renders the appellant liable for the injury to the appellee, for which she sues, provided she was not guilty of any negligence which contributed to the injury.

The duty of a traveller approaching a point on a public highway where a railroad track is crossed upon the same level, has been so often declared by the courts in adjudicated cases and is so well settled and understood by the profession, that it needs no further elaboration. All that is necessary to do here is to refer to some of the cases in which that duty is discussed and defined, and by so doing avoid encumbering this opinion with useless repetition: *Ohio, etc., R. W. Co.* v. *Hill*, 117 Ind. 56; *Baltimore, etc., R. R. Co.* v. *Walborn*, 127 Ind. 142; *Mann* v. *Belt R. R., etc., Co.*, 128 Ind. 138.

Where one approaching a railroad crossing of the kind above indicated is injured, and the facts and circumstances are not controverted, and the inferences from such facts and circumstances are unequivocal, and can lead to but one conclusion, the court will declare, as matter of law, whether the party injured was, or was not, guilty of contributory negligence; but, in practice, it often occurs that the facts and

circumstances surrounding a particular case are such as to warrant different inferences, so that one impartial sensible man may draw the inference and conclusion that the injured party was guilty of negligence, while another man equally impartial and sensible might draw a different conclusion; and in such cases the courts will not adjudge the question of negligence, but will leave it to the jury, under proper instructions. *Baltimore, etc., R. R. Co.* v. *Walborn, supra; Mann* v. *Belt R. R., etc., Co., supra.*

The question with which we are confronted is as to which of these classes the case under consideration belongs.

It can not be said that the appellee exercised no care to avoid the collision described in the complaint. It is evident from the facts and circumstances above set forth that very few seconds intervened between the time she looked north for approaching trains and the time at which she was struck. Of course, it was her duty to look south as well as north, and while doing so and attempting to cross the tracks she was struck by an engine approaching from the north which was not in sight a few seconds before. Had the engine which collided with her been run at the speed fixed by the city ordinance above mentioned, it is quite probable that she would have crossed the appellant's railroad tracks in safety.

While the general rule is that trains may be run at a very high rate of speed without the imputation of negligence, it must be apparent to every one, upon a moment's reflection, that populous cities constitute an exception to the rule, by reason of the great danger to life and limb. *Philadelphia, etc., R. R. Co.* v. *Long,* 75 Pa. St. 257; Wharton Negligence, section 803; *Loucks* v. *Chicago, etc., R. R. Co.,* 31 Minn. 526.

In the absence of some evidence to the contrary, we think the appellee had the right to presume that the appellant would obey the city ordinance and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred, and while the wrongful conduct of the appellant in this regard would not excuse her from

the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption. If when she looked to the north four hundred feet and saw no train, she knew that she could cross the tracks in safety before a train running at the speed fixed by the city ordinance could reach her from that direction, it would be a harsh rule which would adjudge her guilty of negligence because she was struck by a train moving nearly five times as fast as the speed fixed by the ordinances of the city, which she had a right to presume the appellant would obey. *Chicago, etc., R. R. Co.* v. *Boggs*, 101 Ind. 522; *Pittsburgh, etc., R. W. Co.* v. *Yundt*, 78 Ind. 373; *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261; *Pittsburgh, etc., R. W. Co.* v. *Martin*, 82 Ind. 476; *Pennsylvania R. R. Co.* v. *Ogier*, 35 Pa. St. 60; *Kennayde* v. *Pacific R. R. Co.*, 45 Mo. 261; *Tabor* v. *Missouri, etc., R. R. Co.*, 46 Mo. 353; *Chaffee* v. *Boston, etc., R. R. Co.*, 104 Mass. 108; *French* v. *Taunton, etc., R. R. Co.*, 116 Mass. 537; *Howland* v. *Union St. R. W. Co.*, 22 N. E. Rep. 434; *Piper* v. *Chicago, etc., R. W. Co.*, 77 Wis. 247; *Laverenz* v. *Chicago, etc., R. R. Co.*, 56 Iowa, 689; *Schmidt* v. *Burlington, etc., R. W. Co.*, 75 Iowa, 606.

In our opinion the decided weight of authority is that under the facts and circumstances in this case the question of contributory negligence was a question for the jury under proper instructions from the court. *Baltimore, etc., R. R. Co.* v. *Walborn, supra*; *Ernst* v. *Hudson, etc., Co.*, 35 N. Y. 68; *Greany* v. *Long Island R. R. Co.*, 101 N. Y. 419; *McKee* v. *Bidwell*, 74 Pa. St. 218; *Detroit, etc., R. R. Co.* v. *Van Steinberg*, 17 Mich. 99; *Ireland* v. *Oswego, etc., Co.*, 13 N. Y. 533; *Central R. R. Co.* v. *Moore*, 24 N. J. L. 824; *Barbe* v. *Bassett*, 29 N. W. Rep. 198; *Chicago, etc., R. R. Co.* v. *O'Conner*, 119 Ill. 586; 2 Thompson Trials, section 1663; *City, etc.*, v. *Boeckling*, 122 Ind. 39.

The instructions in this cause are full, covering every phase

of the case, and bear evidence of careful study and preparation. They cover all the instructions asked by the appellant, in so far as the instructions asked contain a correct statement of the law. Some of the instructions asked, as well as some of those given by the court, however, require a more particular notice in this opinion.

The appellant, in several instructions, asked the court to instruct the jury, in effect, that if the appellant did not look for approaching trains when she was within ninety feet of the track upon which she was injured, or within thirty-seven feet or twenty-five feet, or just before she entered upon the track, she was guilty of contributory negligence, and could not recover. The court refused to give these instructions, and instructed the jury as follows: "I can not say, as a matter of law in this case, at what particular place or distance from the said railroad track, or at what point it was her duty to look either way, or to listen; but it would not be sufficient to look and listen only away from the presence of danger, but before placing herself in peril she was bound to listen and look for coming trains of cars, that might come from either way; and if she did not so look and listen, and if doing so would have been available for safety, or if she was not otherwise in the exercise of ordinary care, as I have defined it to be, she can not recover in this action," etc.

In this ruling we are of the opinion the court did not err. Under the facts and circumstances in this case we do not think any exact point could be fixed, as the point of danger at which the appellee was bound to look and listen. If she failed to look at the distance of ninety feet from the track, but did look at the distance of eighty-nine feet, or if she failed to look at a distance of thirty-seven feet from the track, but did look at a distance of thirty-five feet, or if she looked when within five feet of the track and saw no approaching train, but did not look at the moment she was stepping upon the track, we do not think it could be plausibly contended that she was guilty of contributory negligence

because she did not look at the precise points indicated in the instructions asked. What the law requires, and all it does require, is, that a person approaching a railroad crossing upon a public highway shall use ordinary care to avoid injury. As to what constitutes ordinary care in such cases, as we have already said, is fully defined and settled by the authorities to which we have referred.

The appellant also complains that the court, in its instruction to the jury, upon the subject of the duty of the appellee in approaching the crossing at which she was injured, was not sufficiently specific, and should have employed the terms used in the instructions asked by the appellant. We do not think this objection is well taken. It is well settled that if the substance of an instruction asked is given by the court, of its own motion, in its own language, there is no available error in refusing to give the instruction as asked. *Town of Martinsville* v. *Shirley*, 84 Ind. 546; *Everson* v. *Seller*, 105 Ind. 266; *Sherman* v. *Hogland*, 73 Ind. 472.

We have carefully examined all the instructions given by the court, in this case, as well as all those asked by the appellant and refused by the court, and we do not think there was any error committed in giving or refusing instructions.

On the trial of the cause the appellee introduced in evidence an ordinance of the city of Indianapolis limiting the speed of engines and trains within the corporate limits of this city to four miles an hour.

The appellant offered to prove:

First. That four miles an hour was an unreasonable rate of speed at the place where the accident occurred, and that the ordinance was for that reason void.

Second. That by the terms of the appellant's charter it was not subject to the restrictions imposed by the ordinance, the charter giving the appellant the power to regulate the time and manner which cars and railroad vehicles travel and property should pass over its road.

Third. That by common consent the officers and citizens

of the city of Indianapolis had never enforced the ordinance, although the same had been frequently violated, and that by reason of that fact the ordinance had lapsed by common consent, and had become obsolete.

The case of *Coal-Float* v. *City of Jeffersonville*, 112 Ind. 15, we think is decisive of the first question presented. The ordinance in question was passed in the year 1866. There was a statute in force, at the time, which expressly conferred the power to pass such an ordinance. 1 G. & H. 226.

In the case above referred to it was said by this court: "The power of a court to declare an ordinance *unreasonable*, and, therefore, void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely."

As this ordinance was enacted by express statutory authority, the court did not err in taking it as the standard of duty by which the appellant was bound, and in refusing to hear evidence that it was unreasonable.

The State could not deprive itself of the right to exercise the police power by granting to the appellant the right to regulate the speed of trains. Such a grant, even if it could be construed as contended here, would amount to a mere license, which might be revoked at the will of the Legislature. *State* v. *Woodward*, 89 Ind. 110.

The police power of a State can not be alienated even by an express grant upon a valuable consideration. Cooley Constitutional Limitations, 340; *Thorpe* v. *Rutland, etc., R. R. Co.*, 27 Vt. 140.

The ordinance now under consideration is a police regulation, authorized by an act of the Legislature, designed to protect the people of the city of Indianapolis against the dangers incident to the rapid movement of engines and trains through thickly populated localities, and is binding upon the

appellant as well as other railroad companies which have tracks within the corporate limits of the city.

The fact that the appellant and others had not been prosecuted for repeated violations of this ordinance would not, in our opinion, tend to prove that it had been abandoned. Such proof might tend to show that those charged with the enforcement of the ordinances of the city had been derelict in their duty, but that could not deprive any citizen who desired to do so from the right of availing himself of its provisions when occasion should require it.

After a careful consideration of all the matters complained of, we are of the opinion that there is no error in the record before us for which the judgment should be reversed.

Judgment affirmed.

Filed Feb. 16, 1892; petition for a rehearing overruled April 29, 1892.

No. 15,748.

PRICE v. BAYLESS.

INJUNCTION.—*Restraining Order Issued by Judge Absent from State.*—A judge of this State can not sit in chambers in the State of Michigan, and issue a valid restraining order. Where an appeal, however, was not taken until after a trial of the cause on its merits, and a final judgment in the appellee's favor which vacated the temporary injunction, the error, though properly saved by the appellant, was not an available error.

EASEMENT.—*Pleading.—Description of Land.—Exhibits.*—In a suit to establish a right to the easement of a right of way across certain lands, the complaint is defective if it does not contain a description of the land over which the easement is claimed. Reference can not be had to exhibits filed with the complaint to make good such an omission, such exhibits being in no sense copies of the writing forming the basis of the pleading.

From the Wells Circuit Court.

E. R. Wilson and *J. J. Todd*, for appellant.

A. N. Martin and *E. C. Vaughn*, for appellee.

McBride, J.—The appellee, by this suit, sought to establish his right to the easement of a right of way across certain lands of the appellant, and to enjoin the appellant from obstructing it, or in any manner interfering with its free use.

The first proposition discussed by counsel for the appellant relates to alleged error of the judge of the Wells Circuit Court in granting a temporary injunction while absent from the State, at Petoskey, in the State of Michigan, and in overruling a motion by the appellant to dissolve the same.

This action was unquestionably erroneous. His authority as judge was conferred alone by the constitution and laws of this State. Our laws have no extra-territorial operation. When the judge passed the boundaries of the State the power to exercise judicial functions did not follow him. He could not, as judge, sit in chambers in the State of Michigan, and issue a valid restraining order. The error, however, while properly saved by exception, and by bill of exceptions, and fully discussed, can not avail the appellant. If he had appealed from that ruling a reversal would have been inevitable.

The appeal, however, was not taken until after a trial of the cause on its merits, and a final judgment in the appellee's favor, which vacated the temporary injunction. The error had thus become harmless. *Board, etc.*, v. *Markle*, 46 Ind. 96.

The appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and this ruling is assigned as error. It is difficult to determine from the averments of the complaint whether the right claimed is an easement acquired by prescription or a way by necessity. It is, not, however, necessary that we resolve this doubt, although in argument counsel for the appellee insist that the theory of the complaint is that the appellee is entitled to a way by necessity. It is also evident that the court below thus construed it. It contains no description of the land over which

the easement is claimed. This omission is sought to be cured by reference to certain so-called exhibits which the pleader asks to have considered as parts of the complaint.

There is no warrant for this practice. A copy of a writing upon which a pleading is in whole or in part founded, may be attached to or may accompany it, and by appropriate reference be incorporated into and made a part of it. To make the complaint good in the case at bar it was necessary that it contain a description of the land over which the easement was claimed. The descriptions of the several tracts of land contained in the three so-called exhibits were in no sense copies of writings forming the basis of the pleading, but were statements of material and necessary facts omitted from the complaint and sought to be supplied in this way. The exhibits form no part of the complaint, and can not be considered for any purpose. *Armstrong* v. *Farmers' Bank, etc.*, 130 Ind. 508, and cases there cited. The court erred in overruling the demurrer to the complaint. Several other questions are discussed, but in the condition of the record they need not be decided.

Judgment reversed with costs, with instructions to the Circuit Court to grant a new trial and sustain the demurrer to the amended complaint.

Filed April 30, 1892.

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No. 16,404.

Curry *v.* The State, for Use of Rhine, Drainage Commissioner.

Notice.—*Sufficiency of Proof of Publication.*—The proof of publication is sufficient when the affidavit of the publisher of the newspaper in which the notice was published states that "the notice was duly published in said paper for three weeks consecutively, the first of which publications was on the 11th of September, 1890, and the last on the 25th day of

September, 1890. The reasonable and fair construction of the affidavit is that the first and third publications were on the first and last days mentioned, and the second on an intervening day.

From the Blackford Circuit Court.

R. S. Gregory, *A. C. Silverburg* and *J. N. Templer*, for appellant.

W. H. Carroll, *G. Dean*, *B. G. Shinn* and *E. Pierce*, for appellee.

ELLIOTT, C. J.—The appellant entered a special appearance and moved to quash "the proof of publication." Assuming that the motion properly presents the proposition argued by counsel, which is that the notice was not published the requisite length of time, we shall consider and decide the question argued, but in doing this we do not mean to be understood as deciding that it is well presented. The affidavit of the publisher of the newspaper in which the notice was published states that "the notice was duly published in said paper for three weeks consecutively, the first of which publications was on the 11th day of September, 1890, and the last on the 25th day of September, 1890." The statement of the publisher that the notice was published three weeks consecutively, repels the assumption that there were but two insertions of the notice in the newspaper. The reasonable and fair construction of the affidavit is that the first publication was on the day first named, the third publication on the day last named, and the second on a day intervening between the first and last dates named in the affidavit. The decisions require this construction and sustain the sufficiency of the notice. *Security Co., etc.,* v. *Arbuckle*, 123 Ind. 518; *Horn* v. *Indianapolis Nat'l Bank*, 125 Ind. 381.

The other questions in the case are fully disposed of by the decision in the case of *Racer* v. *State, etc., ante*, p. 393.

Judgment affirmed.

Filed April 30, 1892.

No. 15,765.

Smith et al. v. The State, for Use of Dowell, Drainage Commissioner.

Drainage.—*Who May Sue on Assessments.*—A commissioner of drainage, in charge of the construction of a ditch, may sue for and collect so much of the assesment made for the construction of such ditch before the same was referred to him as may be necessary to its construction, and he is not restricted to the assessment made by himself.

From the Grant Circuit Court.

G. W. Harvey and *A. De Wolf*, for appellants.

W. H. Carroll and *G. Dean*, for appellee.

Miller, J.—This was an action by the appellee against the appellants to collect an assessment for the construction of a public drain.

The petition for the drain was filed April 29th, 1884, while the act of March 8th, 1883, was in force; and on the 19th day of June, 1885, the work was ordered, and the appellee, as drainage commissioner, was charged with its construction.

As the proceedings for the construction of this drain were pending, when the act of April 6th, 1885, went into effect, they were within the saving clause of the repealing section of that act. Elliott's Supp., section 1196, and the act of 1883, governs the construction of the drain and collection of the assessment. *Claybaugh* v. *Baltimore, etc., R. W. Co.*, 108 Ind. 262; *Dunkle* v. *Herron*, 115 Ind. 470; *Geiger* v. *Bradley*, 117 Ind. 120; *Bohr* v. *Neuenschwander*, 120 Ind. 449.

The appellants demurred to the complaint, their demurrer was overruled, and an answer filed.

The cause was tried by the court, and a finding and judgment rendered in favor of the appellee.

The sufficiency of the complaint is the only question in the case.

Two objections are urged to the complaint:

1st. That no copy of the report of the commissioners making the assessment was filed with the complaint.

In the form in which the transcript was originally certified to this court the complaint appeared to be defective in this respect, but since that time the clerk of the circuit court has, in obedience to a *certiorari*, certified up a copy of the assessment which was properly made a part of the complaint.

2d. That section 4 of the drainage act of 1883, Elliott's Supp., section 1178, provides that a drainage commissioner may, if he so determine, "bring suit in the name of the State of Indiana, for his use as commissioner of drainage, in any court of competent jurisdiction, to enforce a lien upon any tract or tracts of land for the amount so assessed by *him*."

But that the assessment which creates the lien upon the land is the assessment made by the *commissioners* of drainage, as approved or confirmed by the court, and that this act does not authorize the commissioner in charge of the work to sue for the collection of an assessment made by them.

The argument made by the appellants is, in brief, that the provision allowing commissioner of drainage to bring suit was enacted as a part of a previous act, which made it his duty to make the assessment which created the lien; and that the authority to make the assessment having been transferred from him to the commissioners, this provision, as reenacted, is without force.

Such construction should, if possible, be given a statute as will give force and effect to all its provisions, and bring each part into harmony with the other portions of the act.

We are of the opinion that this act is readily susceptible of such construction.

Two assessments are spoken of in the act of 1883, one made by the commissioners of drainage as a body. This is the assessment spoken of in sections 1176, 1177 and 1179, which fixes the maximum amount that can be collected of each land-owner for the construction of the drain; and

which, when confirmed by the court, constitutes the lien upon the lands assessed.

But it is evident that the Legislature contemplated the possibility that it might not require the collection of the whole assessment to pay for the construction of a drain, damages and incidental expenses. It was consequently provided, in section 1178, that the commissioner of drainage, in charge of the execution of the work, should assess, from time to time, upon the lands benefited, ratably, "upon the amount of benefits as adjudged by the court," such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract, and require the same to be paid in instalments.

In a subsequent part of this same section is found the provisions which authorize the commissioner of drainage to bring suit for the amount so assessed by him.

It is quite evident that authority was given the commissioner of drainage to sue for only so much of the original assessment as he deemed necessary to complete the work and pay the costs and incidental expenses. This construction is the one adopted by the appellees, and the complaint shows that both assessments were made, and that the suit is for only so much of the original assessment as the commissioner in charge of the work deemed necessary for its completion.

We find no defect or infirmity in the complaint.

Some exceptions are taken to the form of the judgment. In order to be available in this court specific objections to the form of a judgment must be made in the trial court, and a ruling made in that court. *Walter* v. *Walter*, 117 Ind. 247; *Quill* v. *Gallivan*, 108 Ind. 235; *Adams* v. *La Rose*, 75 Ind. 471.

No objection being made to the form of the judgment in the circuit court, there is nothing before us to decide.

Judgment affirmed, with costs.

Filed May 11, 1892.

No. 16,016.

Hacker v. Conrad.

Election.—*Illegal Voter.—Contest.—Weight of Evidence.*—Where the question involved in a contested election case is one of fact respecting the validity of certain votes cast by persons whose qualifications to vote are assailed, the Supreme Court will not pass upon the weight of the evidence, but will affirm the decision of the lower court.

From the Lake Circuit Court.

T. J. Wood, E. Crumpacker, M. Wood and *C. F. Griffin*, for appellant.

J. H. Kopelke, for appellee.

Olds, J.—This is a proceeding brought by the appellant against the appellee in the commissioners' court of Lake county to contest the appellee's election to the office of township trustee of Calumet township in said county. The appellant and appellee were rival candidates for the office of trustee of said Calumet township at the April election, 1890, and the appellee was declared elected.

It is admitted as a fact in the case that appellee received 119 votes and appellant received 115 votes at said election. The contest is upon the grounds that there were illegal votes cast by illegal voters for the appellee more than the number of votes he received in excess of the appellant, and that appellant in fact received a majority of legal votes cast for trustee at such election.

On behalf of the appellee it is contended that the appellant received illegal votes, and that he received a majority of the legal votes cast for trustee, and was rightfully and legally declared elected.

Some important legal questions are discussed by counsel relating to the rights of alien born citizens coming to this State while infants, who have taken no steps towards being naturalized themselves, and whose parents only declared their intention or took out what is commonly called their

first papers, but we do not find it necessary to pass upon the question, for it is this class of voters whose votes appellant contends are illegal, and upon which he bases his contest; and admitting, or conceding, for the purposes of the case, that such votes were illegal, though we do not decide or intimate an opinion upon the question, there were enough votes cast for the appellant which the evidence would warrant the court in finding to be illegal, and which it did so find, to offset the number of alleged alien voters, or at least a sufficient number to still leave the appellee a majority of the legal votes cast. There were but seven votes cast for the appellee the legality of which were questioned, and the appellee questioned the legality of five votes cast for the appellant. One of the alleged illegal votes cast for the appellee was cast by a foreign born citizen, but the evidence authorized a finding that he had declared his intention to become a citizen, and that he was a resident and a legal voter of said township.

As to the five alleged illegal votes cast for the appellant, the evidence authorized the court in finding that none of the five persons casting said votes were residents or legal voters of said township and precincts in which they voted. The decision of the case depends upon the sufficiency of the evidence to support the finding of the court. The evidence being sufficient to support the finding as to a sufficient number of the votes challenged to result in leaving the appellee with a majority of the legal votes cast, it is unnecessary to decide the question as to the legality of those challenged on the grounds of foreign birth and coming to this country with their parents during infancy; for if we were to hold their votes illegal, appellee would still have a majority of the legal votes, and if we were to hold them legal it would only result in an increased majority for the appellee.

There is no available error in the record.

Judgment affirmed, with costs.

Filed May 10, 1892.

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131 446 / 162 204 / 162 309
131 446 / 163 502
131 446 / 164 386 / 164 433
131 446 / 168 274
131 446 / 170 400 / 170 629

No. 16,334.

The Consumers' Gas Trust Company *v.* Harless et al.

Eminent Domain.—*Scope of Power.—Definition.*—The power to exercise the right of eminent domain embraces all cases where, by the authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular case, either by the State, in its sovereign capacity, or by a corporation, public or private, or by a private citizen to whom such right has been granted by the State.

Same.—*Limitations Upon Power of.—Tender.*—The right of eminent domain is limited only by the Constitution; and the only limitation in this State is that no man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

Same.—*When May be Exercised.—Supervisory Power of Courts.*—The right of eminent domain is to be exercised only where public necessity or convenience requires it; but where such necessity or convenience is declared by the representative of the sovereign—the Legislature—courts can not question the wisdom of such declaration.

Same.—*Time, Manner and Occasion of Exercise of.*—The time, manner and occasion of the exercise of the right of eminent domain are wholly in the control and discretion of the Legislature except as it is restrained by the Constitution of the State.

Same.—*To Whom Right is Granted.*—The exercise of the power of eminent domain being an attribute of sovereignty, the sovereign may grant it to whomsoever it may think proper, and deny it to all others.

Same.—*Payment of Damages on Appeal.—Entry on Land Condemned Pending Appeal.—Validity of Statute.*—A statute allowing an entry upon the land pending appeal from the assessment of damages, on payment to the clerk of the court of the amount of the damage assessed for the benefit of the land-owner, is valid, such payment being equivalent to a tender; but a statute directing the clerk to hold such money until the case on appeal is determined is unconstitutional.

Same.—*Payment of Damages Under Protest.*—A payment under protest does not render the payment or a tender invalid, the protest being a nullity.

Natural Gas.—*Entry on Land Pending Appeal.—Act Valid.*—That part of the act of the Legislature (Acts 1889, p. 22) authorizing natural gas companies in appropriating land for a right of way, to cause the assessment of damages to be made, to appeal therefrom, and, on paying to the clerk of the court the amount of damages assessed, to enter on the land appropriated pending the appeal, is valid.

Same.—*Validity of Act, Restrictions on Citizens of this State.*—The act of 1889,

authorizing citizens or corporations of this State to exercise the right of eminent domain, is not invalid on the ground that it does not authorize citizens or corporations of other States to exercise such right.

SAME.—*Local Law, is Not.*—The natural gas law of 1889 is not subject to the objection that it is local or special.

CONSTITUTIONAL LAW.—*General Law, What is.—Uniformity of Operation.*—A law which applies generally to a particular class of cases is not a local or special law. The Constitution does not require that the operation of a law shall be uniform, other than that the operation shall be the same in all parts of the State under the same circumstances.

From the Madison Circuit Court

W. P. Fishback, W. P. Kappes, R. N. Lamb, R. Hill, R. Graham, H. D. Thompson, for appellant.

M. E. Forkner and *H. C. Ryan,* for appellees.

COFFEY, J.—This was an action by the appellees against the appellant, in the Madison Circuit Court, to enjoin it from entering upon, digging trenches and laying gas pipes in certain real estate belonging to the appellees, described in the complaint. The complaint alleges that the appellant is a corporation organized under the laws of the State of Indiana, and is engaged in leasing lands, drilling gas wells and piping natural gas to the city of Indianapolis, and supplying the same to private consumers; that it is threatening to, and is about to, and has entered upon the land of the appellees particularly described, has torn down their fences and is now digging great trenches in the same, and is laying down a six-inch gas pipe line upon and across said land, and is about to, and is threatening to connect said pipe line with some of its gas wells, and connecting the same with another line of pipes running to the city of Indianapolis; that it entered upon said land and did, and is about to, do the things above set forth without any leave or license from the appellees, and against their protest and over their objections, never having paid or tendered to them the damages that would accrue to them by reason of said acts; that the acts

of the appellant, if not restrained and enjoined, will work great and irreparable damage and injury to the appellees.

To this complaint the appellant filed an answer consisting of one paragraph. The answer admits the ownership of the land in the appellees, the incorporation of the appellant under the laws of the State, and that it is engaged in leasing land, digging gas wells and piping natural gas to the city of Indianapolis to supply private consumers. It avers that it is supplying, for heating and illuminating purposes, forty thousand people in that city with natural gas, who are dependent upon it for such supply, and that it has contracts with such consumers obligating itself to furnish them with natural gas for fuel; that it has main lines leading from the city of Indianapolis northwardly through the counties of Marion and Hamilton into Madison county to near the south line of appellees' land; that it has leased lands lying north of appellees' land and has drilled ten gas wells and laid its gas pipe lines connecting with said gas wells north of appellees' land down to and running along the highway through a part of appellees' land with their full knowledge and acquiescence, leaving a space of only sixty rods through appellees' land necessary to connect appellant's pipe line from the city of Indianapolis with its line connecting with said wells; that being unable to agree with the appellees for a right of way through their land it filed in the circuit court of Madison county its notice and act of appropriation and condemnation of a right of way to lay its pipe line through said land, and thereupon said court appointed three disinterested freeholders of Madison county as appraisers to view the premises and assess the damages that would accrue to the appellees by reason of said act of appropriation and condemnation of a right to lay its pipe through said land; that the appraisers were duly sworn and assessed the damages that would accrue to the appellees by reason of the appropriation at the sum of six hundred dollars, and filed their report thereof in said court; that thereupon the appellant

paid said sum and the costs of said award and filed its exceptions to the report of the appraisers, on the ground that the damages so assessed were unreasonable and excessive, and within ten days after the filing of said report the appellant appealed from said assessment to the Madison Circuit Court, where the same is still pending, and said sum of six hundred dollars is still in the hands of the clerk of said court to abide the result of such appeal; that it paid said sum under protest, and notified the clerk to hold the same pending such appeal; that after perfecting said appeal, as it had the right to do, it entered on said right of way so appropriated, and no other, to lay its said pipe line, and was proceeding to lay the same on, in and along its said right of way so acquired when this action was commenced, and that all the acts done, or threatened to be done, by the appellant were done and proposed to be done under and in accordance with said act of appropriation and condemnation proceedings, and not otherwise; that the appellees appeared in said condemnation proceedings and resisted the same; that the appellant acquired its leases and drilled its wells lying north of said land at an expense of fifty thousand dollars, and that it is necessary to connect said wells with its line south of said land in order to utilize the gas therefrom and furnish a sufficient supply for its consumers, and that it will suffer great and irreparable loss if enjoined from using its right of way through the lands of the appellees.

The circuit court sustained a demurrer to this answer, and, the appellant refusing to answer further, the appellees had a perpetual injunction. This ruling of the court is assigned as error.

The appellees contend that the above ruling of the Madison Circuit Court is justified on five several grounds, namely:

First. Because the act of February 20th, 1889 (Acts of 1889, p. 22), under which the condemnation proceedings, set

up in the answer were had, is void because it is in conflict with section 23, article 1, of our State Constitution.

Second. Because the payment of the amount assessed as damages into the clerk's office without first tendering the same to the appellees, gave no right of entry.

Third. Because to give a right of entry under the statutes of the State, the tender of payment to the clerk of the court must be unconditional, and a tender upon condition that it shall not be received by the land-owner, or with instruction not to pay it over to such owner, gives no right of entry.

Fourth. Because, if the law is to be so construed as to confer the right of entry upon payment of the assessed damages to the clerk of the court, without tender to the land-owner, it is in conflict with section 21, article 1, of the State Constitution.

Fifth. Because the statute in question is in conflict with section 8, article 1, of the Constitution of the United States.

Section 23, article 1, of the State Constitution, provides that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

It is claimed that the act of February 20th, 1889, *supra*, is in conflict with this constitutional provision because it grants to companies, corporations or voluntary associations under the laws of this State, for the purpose of drilling and mining for petroleum or natural gas and furnishing the same to patrons within this State, the right to condemn and appropriate land for the purpose of laying their pipes, and does not grant to such companies, corporations or associations engaged in furnishing petroleum and natural gas to customers without the State the same right.

The right to take private property for public use, without the consent of the owner, is called the right of eminent domain, and belongs alone to the sovereign. It embraces all

cases where, by the authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the State, in its sovereign capacity, or by a corporation, public or private, or by a private citizen to whom such right has been granted by the State. Lewis Eminent Domain, section 1.

The right of eminent domain is limited only by the Constitution, and the only limitation in this State is, that no man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered. Section 21, article 1, Constitution of the State.

It is to be exercised only when the public necessity or convenience requires it, but when such necessity or convenience is declared by the representative of the sovereign, the Legislature, courts can not question the wisdom of such declaration. *Water-Works Co., etc.,* v. *Burkhart,* 41 Ind. 364.

The time, manner and occasion of the exercise of the right of eminent domain are wholly in the control and discretion of the Legislatures of the several States of the Union except as it is restrained by the Constitutions of such States. *Secomb* v. *Milwaukee, etc., R. W. Co.,* 49 How. Pr. 75; *Swan* v. *Williams,* 2 Mich. 427; *Weir* v. *St. Paul, etc., R. R. Co.,* 18 Minn. 155; *Roanoke City* v. *Berkowitz,* 80 Va. 616; Lewis Eminent Domain, section 238.

So, too, the exercise of the power of eminent domain being an attribute of sovereignty, the sovereign may grant it to whomsoever it may think proper, and deny it to all others.

In his valuable work on Eminent Domain, Mr. Lewis, in speaking of this subject, says: "Such has been the common practice since the revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that it is solely for the Legislature to judge what persons, corporations or other agencies may properly be

clothed with this power." Lewis Eminent Domain, section 242.

In this State the Legislature, in the exercise of its discretion, has judged it proper to clothe companies, corporations and associations engaged in the business of furnishing petroleum and natural gas to the citizens of this State, for consumption, with the power of eminent domain, while it has not, as yet, thought proper to clothe companies, corporations and associations not so engaged with that power. It is not our province to inquire into the motives which prompted the Legislature to grant this power to persons engaged in furnishing petroleum and natural gas to the people of this State, and to make no such provision for those furnishing them to the people of other States. It is sufficient for us to know that under the authorities above cited they possessed the power to do so, and that in the exercise of the discretion it possesses it has done so.

Nor do we think the law is subject to the objection that it is local or special. A law which applies generally to a particular class of cases is not a local or special law. *Hymes* v. *Aydelott*, 26 Ind. 431; *Palmer* v. *Stumph*, 29 Ind. 329.

The Constitution does not require that the operation of a law shall be uniform, other than that its operation shall be the same in all parts of the State under the same circumstances. *Groesch* v. *State*, 42 Ind. 547.

In our opinion the act approved February 20th, 1889, now under consideration, is not subjection to the constitutional objection urged against it in this case.

As to the second position assumed by the appellees, it is sufficient to say that the almost unbroken line of decision is that there is no valid objection to a statute like ours, which permits the condemning party to pay the assessed damages into court, for the use of the land-owner, and that such payment is equivalent to a tender, and confers a license to take possession even when an appeal is prosecuted. Lewis Eminent Domain, section 579; *Baltimore, etc., R. R. Co.* v.

Johnson, 84 Ind. 420; *Lake Erie, etc., R. W. Co.* v. *Kinsey*, 87 Ind. 514; Elliott Roads and Streets, 185; *Reisner* v. *Atchison, etc., R. R. Co.*, 27 Kan. 382; *Indiana, etc., Co.* v. *Louisville, etc., R. W. Co.*, 107 Ind. 301; *Norristown, etc., T. P. Co.* v. *Burket*, 26 Ind. 53; *Pittsburgh, etc., R. W. Co.* v. *Sweeney*, 97 Ind. 586; *Terre Haute, etc., R. R. Co.* v. *Crawford*, 100 Ind. 550.

The third position assumed by the appellees presents a question much more difficult than the second. Ordinarily a tender to be good must be unconditional. While there may be some conflict in the authorities, arising out of the different provisions of the several State constitutions, the better reason is, that under a Constitution like ours the Legislature can not authorize an entry upon the land of another, by the party condemning, where the owner is satisfied with the damages assessed, until the damages are paid or such disposition made of the money as amounts to payment. Accordingly, it has been held that a law which authorizes the party condemning to take possession pending an appeal by him, by depositing the damages assessed to be withheld from the owner of the land until such appeal was determined, was unconstitutional in so far as it authorized the withholding of the money. *Meily* v. *Zurmehly*, 23 Ohio St. 627; *State, ex rel.*, v. *Lubke*, 15 Mo. App. 152; *St. Louis, etc., R. W. Co.* v. *Evans & Howard, etc., Co.*, 85 Mo. 307; *Matter of New York, etc., R. R. Co.*, 98 N. Y. 12.

The money in this case, when paid into court, if the appellees were satisfied with the assessment, represented the land appropriated, and at once became the property of the appellees. Such being the case, the direction of the appellant not to pay it to the appellees, was a direction the clerk of the court could not heed, and amounted to nothing. *Meily* v. *Zurmehly, supra; Meyer* v. *State*, 125 Ind. 335; *Ross* v. *Adams*, 28 N. J. L. 160.

The question as to whether the appellant could make a tender to the appellees which they were willing to accept,

and afterwards litigate with them, on appeal or otherwise, their right to the amount tendered, is, perhaps, not before us in such shape as to call for a decision, and for that reason we express no opinion upon it.

What we have already said disposes of the fourth position assumed by the appellees.

Under the fifth position assued by the appellees it is contended that the law in question interferes with interstate commerce, in that it prohibits the piping of petroleum and natural gas out of the State.

It may be that those who desire to pipe petroleum and gas out of the State are hindered in their operations by the absence of a statute conferring on them the power of eminent domain, but we are unable to perceive any interest they have in the question as to whether those piping petroleum and gas for domestic use do or do not possess such power. The former are in no worse condition than they were before the passage of the law under consideration. In other words, it affects them in no manner whatever. How then can it be said to interfere with interstate commerce?

In our opinion the appellant acquired the right to enter upon the land of the appellees by its proceedings in condemnation and the payment of the assessed damages into court, and that the court erred in sustaining a demurrer to its answer setting up such proceedings, and for this reason the judgment rendered herein should be reversed.

Judgment reversed, with directions to the circuit court to overrule the demurrer of the appellees to the appellant's answer.

Filed Jan. 8, 1892; petition for a rehearing overruled April 29, 1892.

No. 15,767.

Shirk, Executor, v. Whitten et al.

Lien.—*Mortgage.—Ditch Assessment.*—When a person buys land subject to a mortgage, and the purchaser subseqnently pays off said mortgage indebtedness, and there is a ditch assessment against said land, the purchaser can not, by so doing, be subrogated to the rights of the mortgagee under said mortgage and have the same declared a prior lien to said assessment, because the estate in fee and the mortgage estate meet in the same person, and the latter is, under the law, completely drowned.

From the Marshall Circuit Court.

J. D. McLaren, *E. C. Martindale* and *J. Mitchell*, for appellant.

W. B. Hess, for appellees.

Elliott, C. J.—The appellant is the executor of Elbert H. Shirk, deceased, and prosecutes this suit in his representative capacity. He avers in his complaint that his testator bought of James N. Tyner a tract of land and received from Tyner a warranty deed on the 6th day of December, 1884; that the warranty was subject to a mortgage for one thousand dollars, executed by a grantor of Tyner on the 13th day of May, 1882; that on the 26th day of September, 1885, the testator paid the mortgage and it was entered satisfied of record; that, on the 7th day of February, 1883, a petition praying for the construction of a ditch was filed in the St. Joseph Circuit Court; that a judgment was entered establishing the ditch, and levying assessments upon lands for the cost of its construction; that among the lands assessed was the tract bought by the testator of Tyner, upon which an assessment for nine hundred and fifty dollars was levied; that the testator had no notice or knowledge of the proceedings for the establishment of the ditch. The prayer of the complaint is that the mortgage paid by the testator be declared a prior lien upon the land, and foreclosed for the benefit of the appellant.

No attack is made upon the proceedings on the petition for the establishment of the ditch, and we must assume that they were valid. As the appellant's testator bought the land after the proceedings were commenced, he could not successfully assail them except upon the ground that there was no jurisdiction, and as the court had jurisdiction of the general subject, the presumption is that it had jurisdiction of the particular case. We conclude, therefore, that the proceedings were valid and effective.

As the appellant's testator bought the land while the proceedings were pending in a court of competent jurisdiction, he was a purchaser *pendente lite*, and bound by the judgment rendered. He acquired title subject to the lien of the assessment, and he holds the land subject to that lien unless some principle of equity subordinates the lien of the assessment to the lien of the mortgage paid by him.

We know of no principle that will authorize the subordination of the assessment lien to that of the mortgage. Shirk paid the mortgage as the owner of the land, and, presumptively, as part of the purchase-money, so that there is no equity which will keep it alive to the destruction of the ditch assessment. *Atherton* v. *Toney*, 43 Ind. 211; *Bunch* v. *Graves*, 111 Ind. 351; *Hancock* v. *Fleming*, 103 Ind. 533; *Robins* v. *Swain*, 68 Ill. 197; *Weiner* v. *Heintz*, 17 Ill. 259; *Mines* v. *Moore*, 41 Ill. 273; *Johnson* v. *Zink*, 51 N. Y. 333; *Russell* v. *Allen*, 10 Paige, 249; *Cleveland* v. *Southard*, 25 Wis. 479. Where a person pays an encumbrance he is under a duty to pay, or for which he is primarily liable, he extinguishes it. *Shields* v. *Moore*, 84 Ind. 440; *Kreider* v. *Isenbice*, 123 Ind. 10. The cases to which we have referred are decisively against the appellant.

The theory of counsel that equity will subrogate the appellant to the rights of the mortgagee under the mortgage paid by his testator, is shattered by the principles declared in the authorities to which we have directed attention, and it is condemned by other fundamental principles. It is con-

demned by the principle that equity will not prevent a merger where to prevent it would result in injustice. *Boos* v. *Morgan*, 130 Ind. 305, and cases cited. There is here a technical merger, inasmuch as the estate in fee met the mortgage estate in one person and in the former the latter is, under the law rule, completely drowned. It is only by the interposition of equity that this result can be averted. But in such a case as this equity will not interpose, for there is no just reason why it should break the course of the rule of the law; there is, on the contrary, strong reason for holding the land subject to the lien of the assessment. The construction of the ditch benefited the land and thus added to its value, so that it is equitable that the land in the hands of its present owners should be subjected to the assessment. There is, in truth, no very satisfactory reason for allowing a mortgage lien to cut under the lien of an assessment for the construction of a ditch in any case, and there is no reason at all why it should be permitted to do so in such a case as the one before us.

The use which the appellant proposes to make of the lien to which he asks to be subrogated and which he prays may be kept alive for his benefit is not an equitable one, and hence a court of equity will not extend a helping hand. *Boos* v. *Morgan*, *supra*. The equity is against him, for, having acquired the land with the betterment which the construction of the ditch created, he ought, in good conscience, to pay the value of the betterment.

We fully recognize and approve the general doctrine that where a purchaser pays an encumbrance which he was not bound in equity to pay, for the purpose of protecting his title, it will be kept alive and enforced for his benefit, but we deny that the doctrine applies to such a case as that made by the complaint. Not one of the many cases cited by appellant's counsel is relevant to the facts of this case.

Judgment affirmed.

Filed April 29, 1892.

No. 15,271.

THE STATE, EX REL. MCKNIGHT, *v.* ROGERS.

DAMAGES.—*Judgment.*—*Collateral Attack.*—*Demurrer.*—In a suit on a guardian's bond alleging damages because of the negligence of the guardian in the discharge of his duty in instituting and prosecuting a suit against appellant, as next friend and guardian of his ward, in which action appellant was interested and was then a ward of said guardian, the complaint alleged that the guardian failed to employ counsel to defend the rights of said appellant, and that but for said breach of duty and neglect, said appellant would not have been damaged therein, and that the judgment rendered against said appellant, as a result of said breach of duty on the part of said guardian, was erroneous. A demurrer to the complaint was sustained.

Held, that the attack upon the decree being made in a suit upon a guardian's bond is necessarily collateral, and to be successful facts must be pleaded showing that the decree is absolutely void.

Held, also, that as the court rendering the judgment attacked had jurisdiction of the subject-matter and of the parties, and the decree was such as might have been rendered in such a case, the decree is binding upon all the parties to it until set aside by a direct proceeding brought for that purpose.

Held, also, that as against a collateral attack a judgment will be conclusively presumed to be correct, and averments in the complaint that appellant's rights were greater or different from what they were then adjudged to be, must be disregarded as in conflict with the finding and judgment of the court.

Held, also, that in so far as this proceeding is concerned, it will be presumed that, notwithstanding a failure on the part of the guardian in the performance of his duty, she suffered no loss by reason of said neglect, and that the court meted out justice to appellant.

Held, also, that the complaint does not state a good cause of action, and that the demurrer was rightly sustained.

From the Monroe Circuit Court.

H. C. Duncan and *I. C. Batman*, for appellant.

J. R. East and *E. Corr*, for appellee.

MCBRIDE, J.—The appellant, by this action, sought to recover on her guardian's bond damages for alleged violation of his duty.

She alleges, in substance, that in the year 1867, she and

her father were owners in fee and tenants in common of certain land, each owning the undivided one-half thereof; that the father was appointed her guardian, and as such guardian, under order of the court, sold her interest in the land for $2,450; that afterward, on the 1st day of September, 1872, the father died intestate, the owner of the remaining undivided half of said land, leaving as his sole heirs the relatrix, another daughter, Lillie Knight, and a widow; that afterward, at the suit of the daughter, Lillie, the Monroe Circuit Court decreed partition of said land, awarding to each of said parties one-third thereof in value; that on the 27th day of December, 1873, one Benjamin F. Rogers was duly appointed guardian both of the relatrix and of said Lillie, and as such executed his bond with the appellee as his surety, entered upon the discharge of the duties of his trust and acted in that capacity until his death in June, 1881.

It is alleged that in February, 1875, while he was acting as such guardian, he, as next friend of the said Lillie, commenced a proceeding in the Monroe Circuit Court against the relatrix and her mother, which he afterward prosecuted to final judgment, which vacated both the guardian's sale made by the father as guardian in 1867, and the subsequent partition proceeding. In this proceeding it is averred that the court found and adjudged, that instead of the relatrix being the sole owner of the undivided half of the land sold as hers in 1867, she, the mother and her sister owned that, with the other land, as tenants in common, each owning the undivided one-third of the entire land, and the court decreed partition accordingly. This latter proceeding resulted in depriving the relatrix of a large portion of the property which had previously been adjudged to be hers. The particular breach of duty complained of is the institution and prosecution by the guardian of this proceeding as the next friend of said Lillie, and that he failed to employ counsel to appear for or defend the right of the relatrix. It is alleged that if he had done so, and had looked after her

interests therein, it would have been adjudged that she was sole owner of said property; that the original guardian's sale would not have been vacated, and that she would have retained all of said property.

It is not charged that the facts involved were not all before the Monroe Circuit Court when the judgment was rendered vacating all of the former proceedings and adjudging that the property belonged to the three parties, but it is claimed that the judgment rendered was erroneous, and resulted in taking from the appellant that which was justly her due.

The appellee insists that as the record comes to us the assignments of error present no question for our decision, and that the judgment should, for that reason, be affirmed. Upon strict technical grounds there appears to be some reason for this contention, but, in our opinion, the ends of justice will be better subserved if we ignore the question suggested, and consider the sufficiency of the facts pleaded to constitute a cause of action, a demurrer filed to a reply having been by the circuit court carried back and sustained to the complaint. A determination of the question presented by this ruling is decisive of every material question involved in the case.

It will be observed that the facts pleaded involve an attack upon the decree and judgment of the Monroe Circuit Court, vacating the original guardian's sale and the original partition proceeding, and finally adjusting the interests of the parties upon the basis of equal rights and interests in each of the three.

The complaint insists, notwithstanding that decree, that the appellant was rightfully the owner of the entire tract of land first sold by her guardian as hers, and that the court erred in rendering a decree which took two-thirds of it from her and gave it to the other two parties.

The attack upon the decree being made in a suit upon the guardian's bond is necessarily collateral. To be successful

facts must be pleaded showing that the decree is void. It is not enough to show that it is erroneous, but it must be shown that it is absolutely void. Otherwise it can not be successfully attacked in a collateral proceeding.

The complaint shows by express averment that the Monroe Circuit Court had, when the decree was rendered, jurisdiction, both of the subject-matter and of the parties, and the decree was such as might properly be rendered in such a case. The decree, therefore, is binding upon all of the parties to it until it is set aside in a direct proceeding brought for that purpose. As against a collateral attack it will be conclusively presumed to be correct, and the averments in the complaint that the appellant's rights were greater, or in any manner or degree different from what they were then adjudged to be, must be disregarded as in conflict with the finding and judgment of the court. It will, therefore, in so far as this proceeding is concerned, be presumed that, notwithstanding there may have been a failure on the part of the guardian to properly represent the appellant, or to employ counsel to represent her, or to protect her interests, she suffered no loss by reason of the neglect, and that the court meted out to her the full measure of her due.

It is clear that the complaint does not state a good cause of action, and that the court did not err in sustaining the demurrer to it.

Judgment affirmed, with costs.

Filed May 11, 1892.

No. 15,122.

FISHER, ADMINISTRATOR, v. FISHER.

EVIDENCE.—*Bill of Evidence—Use of to Prove Testimony of a Deceased Witness at Former Trial.*—A witness' testimony incorporated in a bill of exceptions for the purpose of an appeal is not admissible evidence on a second trial after the case has been reversed and the witness is dead, unless it is first shown that the testimony of such witness therein contained is a true statement of his evidence.

BILL OF EXCEPTIONS.—*Verity.—When Imports.—Object.*—A bill of exceptions imports absolute verity only for the purpose of an appeal of the cause in which it was filed, and is made for no other purpose.

From the Huntington Circuit Court.

J. B. Kenner and *J. I. Dille*, for appellant.

J. C. Branyan and *M. L. Spencer*, for appellee.

OLDS, J.—As shown by the record, the appellant brought this action against the appellee upon a promissory note executed by the appellee to the appellant's decedent for $464.75, and instituted proceedings in attachment. Appellee filed an answer in three paragraphs, the first a general denial, the second alleging that there was no consideration for the note, and the third alleged that the note was given for money lost in dealing in options on grain and gaming contracts in which the decedent, Frank I. Fisher, and the appellee were engaged in the city of Chicago. There was a trial by the court without the intervention of a jury, and a special finding of facts and conclusions of law in favor of the appellee, and judgment in appellee's favor.

The appellant filed a motion for a new trial, which was overruled and exceptions reserved. The ruling on the motion for a new trial presents the question of the sufficiency of the evidence to support the finding, and the competency of certain evidence admitted over the objection of the appellant. The question as to the competency of the evidence is the one properly to be first considered, for if the evidence is incompetent, it being material, the judgment must be reversed.

After the appellant had rested his case, the appellee "offered to read in evidence the evidence of Frank I. Fisher, the plaintiff's decedent, which purports to have been given on a former trial of this cause, and which is incorporated in a transcript or record of the said former case which was appealed and filed in the Supreme Court of Indiana, and which evidence is contained in said record of said cause as filed by said Frank I. Fisher as set out and by him filed in said court."

To this evidence the appellant objected for the reason that the same was not the best evidence, and there was nothing to show that the evidence as set out had been agreed to as true except as contained in said record.

The court overruled the objection and permitted the same to be read in evidence.

It seems to be conceded by counsel, though it does not very clearly appear from the record, that the action was originally commenced by the decedent, Frank I. Fisher, in his lifetime, and a trial had, resulting in a judgment in favor of the appellee, and an appeal taken by said decedent to the Supreme Court, embodying in the record his own testimony given on the former trial, and the judgment reversed; that after the appeal was taken, and before the retrial of the cause in the circuit court, the said Frank I. Fisher died, and his administrator was substituted as plaintiff.

Frank I. Fisher being a party to the action, and having testified as a witness on the former trial of the cause, and having died after that time, and his administrator being substituted as plaintiff before the latter trial, it was undoubtedly competent to prove what the decedent testified to on the former trial of the case. Even his admissions and statements outside of court would have been competent to be given in evidence against the administrator at the latter trial. But such statements of the deceased must be proven by some mode authorized by law.

The bill of exceptions containing the evidence, and which

went into and made a part of the record of the former trial of this cause, was authorized for the purpose of an appeal from the former judgment, and was the recognized mode of bringing the evidence introduced at that trial before the higher court on an appeal from the judgment there rendered. For the purpose of that appeal the bill of exceptions and the record in that appeal import a verity for the purpose of the appeal, but that is the extent of it. It is a verity for the purpose of the appeal because it is authorized, but it is not made for the purpose of a retrial of the cause in the *nisi prius* court, nor for any other purpose except on an appeal from the judgment rendered on the trial at which it was given.

In the case of *Woollen* v. *Whitacre*, 91 Ind. 502, it was held that the bill of exceptions containing the evidence of a witness on a former trial was not competent to impeach or contradict such witness at a subsequent trial.

Counsel for appellee cite several authorities which it is contended support this theory, all of which we have examined, and find that they are not decisive of the question presented in this case. The nearest one in point being the case of *Davis* v. *Kline*, 96 Mo. 401, in which it was held that where the evidence of the witness given on a former trial had been preserved by bill of exceptions, the witness having died before a subsequent trial, and on the subsequent trial a witness was called and testified that the evidence contained in the bill of exceptions was a true statement of the evidence of the deceased witness given on the former trial, it was not error to admit it, but in this case there was no proof of this character, nor does it even appear that the record of which the testimony was a part was either verified or identified as being the record of the evidence given on the former trial, but no objection is made on this ground.

The case of *Kirk* v. *Mowry*, 24 Ohio St. 581, is a case directly in point, and we think enunciates the true doctrine, and holds that the bill of exceptions was not proper evidence.

In that case it is said: "The bill of exceptions was taken under the statute for a specific purpose in that trial, and imports verity no further than the statutory purpose for which it was authorized. It was never intended to be used as evidence in a subsequent trial of the cause of what was the testimony of the witnesses on the trial in which it was taken. Whenever it becomes competent to show, on a subsequent trial of the case, what testimony was given on a former trial, the usual modes of proof can not be dispensed with by resort to the bill of exceptions taken for no such purpose."

The record was not competent evidence of the testimony given by the decedent on the former trial, and the court erred in admitting it, and for this error the judgment must be reversed.

Judgment reversed, at costs of appellee, with instructions to grant a new trial.

Filed Nov. 18, 1891; petition for a rehearing overruled May 11, 1892.

No. 15,575.

Powell v. Bennett.

131 465
155 162

Partnership.—*New Trial.*—In an action to compel an accounting and settlement of a partnership, it is as necessary to prove on trial that the partnership debts were paid as it is to allege it in the complaint, and until the creditors are all paid, no member of the firm can recover for his own use any part of the partnership assets, and a failure to prove such fact is a ground for a new trial.

Same.—*Evidence.*—Under the complaint it was competent for the appellee to prove that the claims in favor of the firm had been collected, and that the partnership debts had been paid.

Judgment.—*Motion in Arrest.*—Motions in arrest of judgment, for defects in a complaint, reach such defects only as are not cured by the finding of the court or the verdict of the jury.

From the Boone Circuit Court.

T. J. Cason and *T. W. Lockhart*, for appellant.

C. M. Zion, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant, in the Boone Circuit Court, to compel an accounting and settlement of a partnership. The complaint alleges, among other things, that the appellant and the appellee, on the 28th day of January, 1888, entered into partnership for the purpose of carrying on a wholesale and retail liquor and tobacco business in the city of Lebanon; that they contributed equally to the capital to carry on said business; that by the terms of their partnership agreement each was to receive one-half the profits, and was to bear the losses equally; that the partnership was dissolved by mutual consent on the 1st day of December, 1888; that by the terms of the dissolution the appellant took the stock on hand at its appraised value, to wit, $315, and agreed to collect the debts due said firm, and on final settlement pay the appellee his full share of the firm assets; that after the dissolution the appellant proceeded to take possession, and now holds all of the assets of the firm, and has collected all the claims due to the firm but has wholly failed, refused and neglected to pay any part of the same to the appellee; that the profits of their business amounted to more than $2,000 over and above all debts, expenses and liabilities, and that there are debts due the firm, upon the books, or were at the time of the dissolution, amounting to $500, which went into the hands of the appellant; that all debts due from the firm have been paid, and that there are in the hands of the appellant assets of the firm of the value of $2,000; that the appellee has frequently demanded an accounting and statement of the assets of the firm and payment of the amount found due him, but the appellant has wholly failed and refused to make such accounting or to pay the appellee any portion of the amount due him.

Prayer for accounting and for judgment for the amount due.

Issues were formed on this complaint, and the answers thereto which were tried by the court, resulting in a finding and judgment for the appellee for the sum of three hundred and fifty dollars.

The appellant contends, in this court, that the circuit court erred in overruling his motion in arrest of judgment, and in overruling his motion for a new trial.

We are of the opinion that the court did not err in overruling the motion of the appellant in arrest of judgment. Motions in arrest of judgment, for defects in a complaint, reach such defects only as are not cured by the finding of the court or the verdict of the jury. *McCormick* v. *Mitchell*, 57 Ind. 248; *Beck* v. *Tolen*, 62 Ind. 469; *Sims* v. *Dame*, 113 Ind. 127; *Lange* v. *Dammier*, 119 Ind. 567.

Under this complaint it was competent for the appellee to prove that the claims in favor of the firm had been collected, and that the partnership debts had been paid.

We are of the opinion, however, that the court erred in overruling the motion of the appellant for a new trial. It is conceded by the briefs before us that the partnership debts are not paid.

It was as necessary to prove, on the trial, that the partnership debts were paid as it was to allege it in the complaint. *Page* v. *Thompson*, 33 Ind. 137; *Briggs* v. *Dougherty*, 48 Ind. 247; *Lang* v. *Oppenheim*, 96 Ind. 47.

In the case of *Page* v. *Thompson*, *supra*, which was an action by one partner, after the partnership business had ceased, to recover his part of a debt due the firm, this court said: "The plaintiff had no right, either at law or in equity, to put any part of it in his private pocket, until the creditors of the firm were satisfied. It can not be useful to cite authorities in support of so plain a proposition."

It is unnecessary for us to decide what is the proper decree in an action for an accounting where there are out-

standing debts due from the firm, as that question is not properly presented by the pleadings and record before us in this case.

What we do decide is that until the creditors are paid no member of the firm can recover, for his own use, any part of the partnership assets. The form of the action can not change the rule.

Judgment reversed, with directions to grant a new trial

Filed March 8, 1892; petition for a rehearing overruled April 30, 1892.

131	468
138	263
131	468
142	472
131	468
164	348

No. 15,464.

Line et al. *v.* The State, ex rel. Louder.

Practice.—*Motion to Make More Specific.—How Made Part of Record.*—A motion to make a complaint more specific is not a part of the record unless brought into such record by a bill of exceptions.

Same.—*Demurrer to Complaint in Action on Bond.—Specifications of Error.—Assignment of Error.*—The particular ruling on a demurrer to separate breaches of a bond assigned in the complaint must be specified in the assignment of error to present on appeal a question on a ruling thereon.

Same.—*Suit on Judgment Pending Appeal.*—Parties are not precluded from suing on a judgment or from prosecuting collateral or independent proceedings after an appeal is taken, although a supersedeas is granted.

Fraudulent Conveyance.—*Sufficiency of Complaint.—No Property Subject to Execution.*—In an action to set aside a fraudulent conveyance it must be alleged in the complaint that at the time of the conveyance, as well as at the time the action was commenced, the defendant, or grantor, had no property subject to execution.

Damages.—*Limit in Suit on Guardian's Bond.*—The amount of recovery in an action on a guardian's bond can not exceed the amount of the penalty designated in the bond.

Costs.—*Reversal in Part.—Principal and Surety.—Action to Set Aside Fraudulent Conveyance.*—In an action on a guardian's bond, and to set aside a fraudulent conveyance by the surety, where a demurrer had been erroneously overruled as to the surety and his wife, the court reversed the

case as to the surety and his wife and adjudged the costs against the relator and in favor of the principal defendant and his surety back to the return of the verdict, the other costs in favor of the relator, and adjudged all costs in favor of the wife.

From the Huntington Circuit Court.

J. B. Kenner, *J. I. Dille*, *B. M. Cobb* and *C. W. Watkins*, for appellants.

J. C. Branyan and *M. L. Spencer*, for appellee.

Elliott, C. J.—The relator's complaint is founded on a bond executed by the appellant Line, as principal, and the appellant Samuel Pressler, as surety. The bond is conditioned for the faithful performance by the principal obligor of his duties as guardian of an infant ward. The complaint also seeks to set aside, as fraudulent, a conveyance made by Pressler to his wife.

A motion to make a complaint more specific is not part of the record proper, and it is not brought into the record by the act of the clerk in copying it into the transcript.

No question is presented upon the ruling on the separate demurrer to the breaches of the bond assigned in the complaint, for the reason that there is no specification of error presenting the ruling for consideration. The particular ruling must be specified in the assignment of errors or no question will be presented on such ruling.

We regret to be compelled to hold that the second paragraph of the complaint is bad in so far as Mrs. Pressler the fraudulent grantee is concerned. It is bad for the reason that it fails to allege that the alleged fraudulent grantor had no property subject to execution at the time the suit was commenced. It is settled law in this jurisdiction that a complaint to set aside a fraudulent conveyance is bad unless it shows that at the time the suit was commenced, as well as at the time the conveyance was made, the grantor had no property subject to execution. The reason for the rule is, that a plaintiff has no right to subject property in the hands

of a grantee of his debtor to sale unless it appears that there is no other property which can be reached by ordinary legal process. *Bruker* v. *Kelsey*, 72 Ind. 51; *Sherman* v. *Hogland*, 73 Ind. 472; *Phelps* v. *Smith*, 116 Ind. 387 (394), and cases cited; *Sell* v. *Bailey*, 119 Ind. 51, and cases cited. The question as it is here presented is one of pleading and not of evidence, so that the decision in *Towns* v. *Smith*, 115 Ind. 480, is not in point. The special verdict does not cure the error. It is defective in not finding that the grantor in the alleged fraudulent conveyance had no property subject to execution at the time the conveyance was executed.

The answer setting forth that there was an appeal pending from a judgment setting aside the order approving the guardian's final report was not good. An appeal, where a supersedeas is obtained, stays proceedings on the judgment from which the appeal is prosecuted, but it does not preclude parties from suing on the judgment or from prosecuting collateral or independent proceedings. *Burton* v. *Burton*, 28 Ind. 342; *Burton* v. *Reeds*, 20 Ind. 87; *Randles* v. *Randles*, 67 Ind. 434; *Nill* v. *Comparet*, 16 Ind. 107; *State, ex rel.*, v. *Krug*, 94 Ind. 366 (371).

The penalty of the bond sued on is one thousand dollars. Under our decisions there can be no recovery beyond the penalty of the bond in a case where the penalty is expressly designated. *Meadows* v. *State, ex rel.*, 114 Ind. 537; *Graeter* v. *De Wolf*, 112 Ind. 1. The relator has offered to remit the amount of the judgment in excess of one thousand dollars, and is hereby permitted to do so.

The personal judgment as to Benajah Line and as to Samuel Pressler, is affirmed upon the *remittitur*. The judgment as to Eliza Pressler and Samuel Pressler as to the alleged fraudulent conveyance, is reversed. The costs must be adjudged against the relator in favor of Samuel Pressler and Benajah Line, back to the return of the verdict. Other costs are adjudged in her favor. All costs are adjudged in favor of Eliza Pressler.

The judgment, so far as affects the right to set aside the conveyance to Eliza Pressler, is reversed, and the cause is remanded with instructions to permit the relator to amend her complaint, if she so elects, and if issue be joined thereon, to try such issue as to the alleged fraudulent conveyance, but not to open the case as to any other issue.

Filed March 17, 1892; petition for a rehearing overruled May 10, 1892.

131	471
133	547
133	658
131	471
136	59
131	471
153	92

No. 16,373.

Langenberg v. Decker.

Tax Commissioners.—*State Board.—Power to Punish for Contempt.*—So much of the tax law of 1889, as attempts to confer upon the State Board of Tax Commissioners power to fine and imprison for contempt is unconstitutional.

Constitutional Law.—*Independence of the Three Departments of State.*—The power of the three great departments of the State are not merely equal, but they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other.

Contempt.—*Power to Punish for, Who May Exercise.*—Only the courts and the General Assembly can punish for contempt; and the power to do so can not be conferred upon any other official or board of officials.

General Assembly.—*Delegation of Power.*—The General Assembly can not delegate its law-making power to any person or body.

From the Marion Superior Court.

A. G. Smith, Attorney General, for appellant.

A. C. Harris, *T. A. Stuart*, *W. V. Stuart*, *C. B. Stuart*, *W. A. Ketcham*, *S. O. Pickens*, *S. N. Chambers*, *C. W. Moores*, *A. Zollars*, *N. O. Ross*, *J. T. Dye*, *J. M. Butler*, *A. H. Snow* and *J. M. Butler, Jr.*, for appellee.

Coffey, J.—The General Assembly of the State passed an act, which was approved and went into force on the 6th day of March, 1891, entitled "An act concerning taxation,

repealing all laws in conflict herewith, and declaring an emergency."

The act creates a State Board of Tax Commissioners, composed of five persons, viz., the Secretary of State, the Auditor of State, and the Governor of the State, who are styled *ex officio* members, and two persons of opposite political faith appointed by the Governor of the State. At the time the matters occurred, out of which this suit arose, the board was composed of the Secretary of State, the Auditor of State, the Governor of the State, Josiah N. Gwin and Ivan N. Walker.

By the provisions of the act the Governor of the State is the chairman of the State Board of Tax Commissioners.

Section 129 of the act provides that this board shall annually convene in the office of the Auditor of State on the first Monday of August each year for the purpose of assessing railroad property and equalizing the assessment of real estate; that it shall not be bound by any reports or estimates of value of railroad property, real estate or other property, as returned to the county auditors or to the Auditor of State, but shall appraise and assess all property at its true cash value, as defined by the act, according to its best knowledge and judgment, and so equalize the assessment of property throughout the State. It also contains this provision: "They shall have the power to send for persons, books and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions, by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace so far as applicable. The sheriffs of the several counties of the State shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred

upon it by the provisions of this statute, the State Board of Tax Commissioners, on its own motion, caused a subpœna *duces tecum* to be issued to all the banks in the State, requiring the president, cashier and book-keeper, or either of them, of the bank named in the subpœna, to appear before the board, at the office of the State Board of Tax Commissioners, in the State-House in the city of Indianapolis, on a day named in the subpœna, and to bring and have with them, then and there, such books, papers and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto, or with reference to the property owned by the bank itself. The subpœna was signed by Joseph T. Fanning, as secretary of the board.

At the bottom of the subpœna, and following the signature of the secretary, was the following:

"For the purposes of the State Board of Tax Commissioners, as set forth in this subpœna, it will answer if the president, cashier or book-keeper of the above mentioned bank make out a sworn statement of the balances to the credit of its individual depositors on April 1st, 1891, giving name in full of each depositor, amount of his credit balance, and forward said sworn statement to the State Board of Tax Commissioners without delay."

One of the subpœnas was served upon the appellee, at the city of Evansville, where he resides, and where he is vice-president of a State bank known as the German Bank of Evansville. In answer to the subpœna he appeared before the State Board of Tax Commissioners on the 25th day of August, 1891, when there was present of the members of the board the following persons, and no others, viz.: Claude

Matthews, Secretary of State, acting as president of the board; J. O. Henderson, Auditor of State, and Ivan N. Walker.

Upon his appearance he was duly sworn, when the following proceedings were had, viz.:

"Question. State your name and place of residence? Answer. Phillip C. Decker; I reside in the city of Evansville.

"Q. In what business are you engaged? A. That of banking.

"Q. With what institution are you engaged, and in what capacity? A. I am vice-president of the German Bank of Evansville, Indiana; the president lately died and I am acting as president. Our bank was organized under the laws of Indiana.

"Q. State the aggregate amount of the individual deposits held by the German Bank of which you are vice-president on the 1st day of April, 1891. A. About $300,000.

"Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor.

"The witness: Before answering the question I respectfully ask the board whether there is any appeal, complaint, suit or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner."

By the board: "No; we are exercising the power of discovery."

The witness: "I decline to answer, under the advice of couusel, either as to the name of any depositor or the amount of his deposit."

"Q. Give me the amount of personal property, other than money, held by your bank, as custodian or agent, on the 1st day of April, 1891, such as notes, stocks, bonds or other property of value belonging to any one depositor?" A. "I respectfully ask the board to state, before an answer to the question just put, whether there is any appeal, complaint, cause or proceeding of any kind pending before this

board or elsewhere to assess the property of said bank or any partner therein."

Answer by the board: "No."

The witness: "I decline to do so, under advice of counsel."

"Q. For the purpose of ascertaining what, if any, money on deposit in your institution, belonging to persons, firms, companies or corporations, has been omitted purposely or otherwise from the tax duplicate of Vanderburgh county. You will please give this board a list of the names of your depositors on the 1st day of April, 1891. A. I most respectfully decline to give such list, having just been informed by the board that no appeal, complaint, suit or proceeding is here pending before this board or elsewhere, to assess or revise the tax list of any depositor, or partner, or officer of the bank.

"Q. For the purpose above indicated, give a list of depositors on the 1st day of April, 1891, with the several amounts of money to their credit on that day. A. I decline to give either the names of my depositors or the several amounts standing to their credit, respectively, on the 1st day of April, 1891, either for taxes or for any other purpose, because I am now informed by the board that there is no appeal, complaint, suit or proceeding pending here or elsewhere to assess or revise the tax list of any depositor.

"Q. Likewise give us the names of all persons who have property other than money, stocks, bonds, jewelry or other property of value by said German bank held as custodians on the first day of April, 1891, and the several amounts, with a description and value of such property. A. I decline to answer your questions for the reasons given above.

"Q. By an examination of the books and papers of said bank would you, as its vice-president, be able to furnish to this board the information asked for in the foregoing question? A. I would not.

"Q. You are now commanded to produce such books and

papers of the German bank for the inspection of this board as will fully afford the information herein sought to be obtained, and which will discover the names of the depositors of said German bank on the 1st day of April, 1891, and the several amounts to their credit; also, such books as will show the names and description of the property of value held by said bank as custodian and agent on said day. A. As vice-president of said bank I now decline to produce any of its books or papers for the inspection of this Board for any purpose."

Thereupon the State Board of Tax Commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of five hundred dollars, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore, it is considered and ordered by the State Board of Tax Commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be and hereby is fined in the sum of five hundred dollars ($500), and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied."

Upon entering the foregoing judgment the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of five hundred dollars for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion Superior Court praying for a writ of *habeas corpus*.

To the writ issued upon this petition the appellant made his return stating, among other things, substantially the proceedings above set forth. To this return the appellee filed

exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion Superior Court in sustaining the exceptions to the return made by the appellant to the writ of *habeas corpus*.

It is contended by the appellee:

First. That the power to punish for contempt is a judicial function which can only be exercised by a court; and if it be claimed that the act in question makes the State Board of Tax Commissioners a court, then so much of the act as seeks to do so is void, because it is not embraced in the title of the act, and because three of the persons constituting the board are forbidden by the Constitution of the State from exercising judicial functions.

Second. That if the board has power to punish for contempt it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action or proceeding then pending.

Third. That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

Fourth. That the State Board of Tax Commissioners has no original jurisdiction except in the matter of the assessment of railway corporations and equalizing the assessment of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court, but it seems to us that if the first proposition presented by the appellee, namely, that so much

of the statute in question as attempts to confer on the State Board of Tax Commissioners the power to fine and imprison for contempt of its authority is void, by reason of being in conflict with State Constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position can not be maintained, then some or all of the other propositions do arise, and must be decided by this court, but the first inquiry in a case like this leads, naturally, to an investigation of the authority under which the complaining party has been deprived of his liberty.

The solution of the question presented renders it necessary that we shall inquire:

First. As to what department of the State government the State Board of Tax Commissioners belongs; and,

Second. Into the nature of the power to fine and commit for contempt.

Article 3, section 1, of our State Constitution, is as follows:

"The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

The division of powers made by our Constitution exists in the Federal Constitution and in most, if not all, of the State Constitutions. The powers of these departments are not merely equal, they are exclusive, in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a Republican form of government. *Wright* v. *Defrees*, 8 Ind. 298; *Lafayette, etc., R. R. Co.* v. *Geiger*, 34 Ind. 185; *State, ex rel.*, v. *Denny*, 118 Ind.

382; *State, ex rel.*, v. *Noble*, 118 Ind. 350; *Hovey* v. *State, ex rel.*, 127 Ind. 588.

It is the duty of the legislative department of the State to make the laws; it is the duty of the judicial department to construe and apply them; and it is the duty of the executive department to see that such laws are faithfully executed.

No provision of our Constitution was more carefully considered and fully discussed in the Constitutional Convention than the one now under consideration. As to the legislative department it is believed that Mr. Biddle expressed what was the understanding of the convention when he said: "The General Assembly has no other duty nor *power* than to *make* laws. After a law has been enacted this department has no further power over the subject. It can neither adjudge the law nor execute it, but must leave it upon the statute books, and for any function still remaining in the legislative power, there it would forever remain. All the power of this department here ends." 2 Constitutional Debates, 1324.

It can not, with propriety, be contended that the State Board of Tax Commissioners belongs to the legislative department of the State, for it has no power to enact laws. The General Assembly can not delegate its law-making power to any other person or body. It can not be successfully maintained that the Legislature could confer on the Governor of the State and the principal administrative officers of the State duties pertaining to the judicial department. Indeed, the learned Attorney-General admits, in argument, that the State Board of Tax Commissioners is not a court, and he does not contend that it can perform any function which is of a purely judicial character. As the State Board of Tax Commissioners is neither a legislative body nor a court, it must belong to the executive or administrative department of the State. That it does belong to that department, we think, is too plain for argument. It is charged with the duty of executing certain provisions of the revenue laws of the State, and when it has performed that

duty its functions are at an end. But because it is a body belonging to the executive or administrative department of the government it by no means follows that it may not perform functions which are, in their nature, judicial. Hearing and determining appeals from the county board of review, hearing witnesses and equalizing the appraisement of real estate, and assessing the railroad property named in the act, is the performance of a duty judicial in its nature.

Mr. High, in his work on Injunctions, section 493, in speaking of the power of courts of equity to enjoin assessments, says: "So the fact that the tribunal fixed by law for determining and equalizing the value of property for the purposes of assessment has assessed it too high will not warrant an injunction, since the action of such officers is judicial in its nature and will not ordinarily be reviewed in equity."

Mr. Mechem, in his work on Public Offices and Officers, in considering the subject of the liability of judicial officers on account of their official acts, in section 636 says: "There is still a large class of officers whose duties lie wholly outside of the domain of courts of justice, or concern the business of the court only incidentally or occasionally, and who are yet called upon by law to exercise, for the benefit of the public or of individuals, powers very nearly akin to those of judges in the courts."

In the case of *State* v. *Wood*, 110 Ind. 82, this court, in speaking of the power of the board of county equalization, said: "The board was not, nor was it necessary that it should be, a court. It was not, and could not be, sitting as a court. It was in the exercise of statutory powers and duties, which duties, perhaps, may be said to be *quasi* judicial."

So in the case of *Kuntz* v. *Sumption*, 117 Ind. 1, in speaking of the same tribunal, this court said: "We agree with the appellee's counsel that the board of equalization is not a judicial tribunal, in the strict sense of the term; but while

this is true, it is also true that it possesses functions of a judicial nature."

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Office and Officers, section 637, says: '"*Quasi* judicial functions * * * are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi* judicial.'"

That it was in the power of the General Assembly to confer on the State Board of Tax Commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate and to assess the railroad property named in the act is not doubted, and the question as to whether the Legislature could confer upon it the power to fine and imprison the citizens of the State for contempt of its authority depends upon whether such action is purely judicial or only *quasi* judicial.

A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. *Maxwell* v. *Rives*, 11 Nev. 213; *Holman* v. *State*, 105 Ind. 513.

In the case of *Ex parte Doll*, 7 Phila. 595, in discharging the prisoner who had been committed by a commissioner appointed by the United States Circuit Court, as for a contempt, for refusing to appear and testify and produce certain books, the court said: "I very much doubt the power of Congress

to invest a commissioner with the authority in a proceeding originally instituted before him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer, appointed and holding his office in the manner in which these commissioners were appointed and held their offices."

Again, in the celebrated case of *Kilborn* v. *Thompson*, 103 U. S. 168, involving the question of the power of Congress to arrest and punish a witness for contempt in refusing to answer questions before a committee of the House, Justice MILLER, in speaking for the court, said: "The Constitution declares that no person shall be deprived of his life, liberty, or property, without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law and governed by the rules of law previously established."

So, again, in the case of *In re Mason*, 43 Fed. Rep. 510, in which Mason had been committed by a United States Circuit Court Commissioner for contempt in failing to appear and testify as a witness, the court said: "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power can not be upheld upon inferences and implications, but must be expressly conferred by law."

As bearing upon the question now under discussion, see, also, *In re McLean*, 37 Fed. Rep. 648; *Anderson* v. *Dunn*, 6 Wheat. 204; *Shoultz* v. *McPheeters*, 79 Ind. 373; *Vandercook* v. *Williams*, 106 Ind. 345; *Ex parte Milligan*, 4 Wall. 2; *Gregory* v. *State, ex rel.*, 94 Ind. 384; *Whitcomb's Case*, 120 Mass. 118.

These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a State expressly confers such power upon some other body or tribunal. Our State Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party can not be deprived of his liberty without a trial. To adjudge a person guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer, otherwise it can not be determined that the witness is in contempt of its authority in refusing to answer.

So far as we are informed, the trial of a citizen involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the State Board of Tax Commissioners power to fine and imprison for contempt is in violation of section 1, article 3, of our State Constitution, and is void. It follows that such board had no authority to fine the appellee and commit him to the jail of Marion county, and that the Marion Superior Court did not err in ordering his release.

It is claimed, however, by the learned Attorney General that the conclusion here reached is in conflict with the conclusion in the cases of *Ex parte Mallinkrodt*, 20 Mo. 493; *Swafford* v. *Berrong*, 84 Ga. 65, and *Noyes* v. *Byxbee*, 45 Conn. 382.

We have given each of those cases a careful consideration.

In *Ex parte Mallinkrodt*, *supra*, it was held that the powers of a notary public in taking depositions was purely statutory, and that the statutes of the State of Missouri did not confer on such officer the power to commit a witness for refusing to produce books.

In the case of *Swafford* v. *Berrong, supra,* it was held that the act of the General Assembly incorporating the town of Clayton conferred upon the Governing Board or Council judicial powers, with authority to try offenders alleged to have violated the town ordinances; and inasmuch as it was a court, when sitting for that purpose, it had the power to punish for contempt. No question of the authority of the General Assembly to confer such power, under the Constitution of Georgia, was involved in the case or decided by the court.

In the case of *Noyes* v. *Byxbee, supra,* it was held that the statutes of Connecticut did not confer on the insurance commissioner, appointed to investigate the financial condition of life insurance companies, power to commit a witness for refusing to be sworn to answer questions.

In our opinion these authorities do not conflict with the conclusion we have reached in this case.

Striking out the portion of the statute which attempts to confer on the State Board of Tax Commissioners the power to punish by fine and imprisonment for contempt, does not necessarily affect the validity of any other provision, but it disposes of the question as to whether the appellee is lawfully imprisoned, and, striking out such provision, the conclusion necessarily follows that he is entitled to his release. This is the sole purpose of a suit of this kind. The purpose of the suit being attained, the other questions sought to be presented in this cause, and so ably discussed on both sides, do not arise, and we can not, with propriety, discuss or decide them. If this were a prosecution for a violation of other provisions of the statute, or if it were a suit to enjoin the collection of increased taxes made on an increase in the value of property not named in the act fixed by the State Board of Tax Commissioners in the exercise of original jurisdiction, then we could, perhaps, make a binding adjudication as to the other questions discussed, but in a suit like this, where the sole question relates to the right of the ap-

pellee to be released from an unlawful imprisonment, inflicted by a tribunal without authority to commit him, we do not think they are involved in such a sense as to render it necessary or proper that they should be decided.

Judgment affirmed.

Filed May 10, 1892.

CONCURRING OPINION.

ELLIOTT, C. J.—A citizen can only be imprisoned by due process of law. Where there is an imprisonment without due process of law, the great writ of liberty will deliver the citizen from an unlawful restraint. If, therefore, the appellee was imprisoned without due process of law, the writ of *habeas corpus* was properly awarded, and this appeal must fail. There is, it is obvious, one question only that we can with propriety decide, and that is, whether the appellee was imprisoned by due process of law.

Prison doors open only at the command of the law, and that law must be warranted by the Constitution. It is the law that restrains citizens of their liberty, and the command for the restraint must issue from an officer or tribunal having jurisdiction to adjudge imprisonment. If the State board had jurisdiction to adjudge that the appellee should be imprisoned, there was due process of law; if it had no jurisdiction to imprison, there was not due process of law, and the appellee was unlawfully deprived of his liberty. A judgment of a tribunal—even the highest in the land—is absolutely void if rendered in a case over which it had no authority. Whether the State board had authority in this instance to consign a citizen to prison depends upon the validity of the statutory provision assuming to invest the board with the high power of casting citizens into jail. The question is one of legislative power. If the power exists, then the Legislature may authorize a board of town trustees, a board of assessors, a board of road supervisors, or any other administrative officer to adjudge imprisonment against a citi-

zen who disobeys an order made by it. If it be granted that the power exists, then it inevitably follows that it is one which can not be limited or controlled by the courts, but is to be exercised without limit or restraint by the legislative department of the government.

In my judgment the Legislature has no power to authorize an administrative or executive officer, whatever his rank or duties, to sentence a citizen to imprisonment. It can not confer that authority upon the Governor of the State, nor upon any other executive or administrative officer, nor upon all the executive or administrative officers of the State combined.

The Constitution defines the power of the Legislature to punish for contempt. It expressly provides when the Legislature may punish for contempts committed against its own immediate authority, and thus clearly denies the power to punish save as expressly provided, for the express provision excludes all implied ones. This is the provision of the Constitution: "Either house, during its session, may punish by imprisonment, any person not a member, who shall have been guilty of disrespect to the house by disorderly or contemptuous behavior in its presence, but such imprisonment shall not at any time exceed twenty-four hours." Article 4, section 15. This provision, as every one can see, closely binds and strongly fetters the power of the General Assembly itself, for it restricts the exercise of the authority to the time that body is in session, and limits the duration of the imprisonment to twenty-four hours. As the Legislature can only exercise the authority given it while in session, it is absolutely without power to lodge the authority in any administrative officer or body of its own creation.

The authority to imprison resides where the Constitution places it, and the Legislature can not give it a residence elsewhere. The authority is essentially a judicial one abiding in the courts of the land. As it is a judicial power it is not created by the Legislature nor vested by that body. The Legislature can not create judicial power, nor vest it in

any tribunal. Judicial power, like all sovereign powers, comes from the people, and vests where the people's Constitution directs that it shall vest. The Legislature may name tribunals that shall exercise judicial powers unless the Constitution otherwise provides, but the power itself comes from the Constitution, and not the statute. *State, ex rel.,* v. *Noble,* 118 Ind. 350 (354); *People, ex rel.,* v. *Maynard,* 14 Ill. 419; *Perkins* v. *Corbin,* 45 Ala. 103; *Greenough* v. *Greenough,* 11 Pa. St. 489; *Missouri River, etc., Co.* v. *National Bank,* 74 Ill. 217; *Harris* v. *Vanderveer,* 21 N. J. Eq. 424. The Legislature may distribute the judicial power in accordance with the Constitution, but it can not delegate that power for the plain reason that it has none to delegate.

If the State Board can be regarded as a judicial tribunal in the true sense of the term, the distribution of authority to it to punish for contempt by imprisonment would be valid and effective, but it is not a judicial tribunal. It does, indeed, possess powers of a judicial nature, but so does every officer in the land, high or low, who has the slightest discretion as to the mode of exercising his duty, and yet nothing can be clearer upon principle and authority than that such an officer is not a judicial officer within the meaning of the Constitution. *Eastman* v. *State,* 109 Ind. 278 (281), and cases cited; *Wilkins* v. *State,* 113 Ind. 514, and cases cited. We understand the Attorney-General to concede, in his able and elaborate argument, that the State Board is not a court. He says, tersely and explicitly, that "the State Board is neither a court nor can it be made a court." He endeavors, however, to prove that the case is not within the rule that only courts can exercise purely judicial powers by this line of argument. "But," as he says, "the proceeding to assess and value property for the purpose of taxation is neither a case nor a controversy. It does not operate through legal forms nor require the machinery of the courts to put it in operation. Such proceedings are not authorized to settle private controversies, and they do not involve any questions

which courts are or ever were authorized to take jurisdiction of." It may be granted that this argument is in part valid, but it is so only in part. The conclusion spreads far beyond the valid premise. In free countries courts always have assumed jurisdiction of questions involving personal liberty, and so they must, or else free government, securing personal liberty, ceases to exist. When that great right comes in issue, the courts hear and decide, and the authority of executive or administrative officers is at end. Whatever else such officers may be empowered to do, they can not be empowered to sit in judgment upon the right of a citizen to his personal liberty. Only the courts can give the command which takes from the citizen his liberty and places him within prison walls, and they can only give it in accordance with the law of the land. However extensive the authority of the board may be, it is always ministerial or administrative, and hence it does not go far enough to adjudge imprisonment, for it is beyond the power of the Legislature to invest it or any administrative board with that high judicial function.

It is, doubtless, within the power of the Legislature to authorize the State Board to lodge a complaint against a person who disobeys a rightful order made by it in a court of competent jurisdiction, and thus secure, by constitutional methods, the punishment of a wrong-doer, but the board can not be invested with the authority to hear and decide, for that dwells only in courts of justice. The board may be made a complainant by law in a proceeding to punish a citizen who refuses obedience to its rightful authority, or it may be empowered to require some law officer of the State to invoke the assistance of the courts, but a court or a tribunal of judges it can never be as long as our Constitution remains unchanged, or as long as the great principle of free government, forbidding the centralization of the powers of government in one department, is respected and obeyed.

For the reasons thus hastily stated and dimly outlined I fully and unreservedly concur in the conclusion reached by the court.

Filed May 10, 1892.

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131 489
165 329

No. 16,160.

Curtis v. Curtis.

Habeas Corpus.—For sufficiency of petition see opinion.

Deposition.—*Seal of Notary.—Clerk's Certificate.*—When a notary public in a foreign State, taking a deposition, omitted his seal from the certificate, but the clerk of the county, by a proper certificate, attested to the official character and signature of the notary, there is no cause for suppressing the deposition.

Costs.—*Bond for.*—In law, *prima facie*, the domicil of the husband is the domicil of the wife, and when the husband makes a motion to require the wife to give a non-resident's bond, and makes no proof of her non-residence, but relies upon the averments of the complaint to show that fact, the husband being a resident of this State, the wife could not be required to give a bond for costs in an action against her husband.

From the Tippecanoe Superior Court.

R. P. Davidson, for appellant.

A. Rice and *W. S. Potter*, for appellee.

Olds, J.—The appellant, Erasmus K. D. Curtis, and the relatrix, Lucy A. Curtis, husband and wife, had born to them one child, a daughter, Nellie D. Curtis, now about six years old. In October, 1888, and for about four years prior thereto they lived in the city of Staunton, Virginia, with Adrian Ann Curtis, mother of the appellant. In the month of October, 1888, at the request of the appellant, the relatrix was absent from the house dining with a neighbor and friend, having been induced by appellant to go to the house of her friend without her child, and in her absence the appellant abandoned the relatrix, taking the child with him.

Afterwards his mother joined him at Lafayette, Indiana, where they have since been keeping house, appellant concealing the whereabouts of himself and child, so that the relatrix had no knowledge as to the whereabouts of either until immediately before the filing of her petition in this case. Immediately on ascertaining where the appellant and the child were she filed her petition for a writ of *habeas corpus* for the custody of the child. There was a final hearing before the Superior Court of Tippecanoe county, resulting in a judgment in favor of relatrix, giving to her the custody of the child, and rendering a judgment against the appellant for costs.

The first alleged error discussed relates to the ruling of the court on appellant's motion to require the relatrix to give bond for costs. This question we will consider later on in the opinion.

It is next contended that the petition is insufficient. We can not agree with counsel for appellant on this proposition. The petition is too long to set out a copy of it. It avers the marriage of the appellant and the relatrix, the birth of the child, the strong attachment existing between her and the child; that she had in every way demeaned herself properly toward her husband, and had been a loving and dutiful wife; that she is now living with her father and mother; that her father is a man of ample means, and has a good home; that he is ready, willing and anxious to furnish a permanent and comfortable home within his said house for both the relatrix and her said child; that both her father and mother are highly moral and upright and respectable people, kind-hearted, generous and indulgent, and will afford relatrix every facility and assistance in properly bringing up and raising her said child; that relatrix has in her own right real and personal property to the amount of $3,000.

It further alleges the facts in regard to the cruel and unwarranted taking of the child from its mother, and secreting it and not allowing her to know where it was.

It alleges facts showing both the appellant and his mother to be unfit to take charge of and rear the child; that the appellant has no means with which to support the child except as he earns it upon the railroad as a brakeman or receives it from his mother, who has but limited means; that he is compelled to leave the child with his mother most of the time, and she feels very unkindly toward the relatrix, and will, if allowed to retain the custody of the child, teach it to dislike and hate the relatrix. There are many other allegations in the petition showing the appellant to be an unfit person to have the custody of the child, and that the relatrix is a suitable and competent person, well able to care for, and ought to have the custody of the child, and that it is for the best interests of the child to give the custody of it to the mother.

The petition is clearly sufficient.

It is contended that the court erred in overruling appellant's motion to suppress depositions of certain witnesses taken in Virginia, for the reason that they were not properly certified to by the notary public. The notary had no seal attached to his certificate, but the clerk of the court of Hastings certified as to the official character of the notary, and that his signature to the certificate was genuine. To the clerk's certificate is attached the seal of the court. This is sufficient. *Pape* v. *Wright*, 116 Ind. 502. There was no error in overruling the motion to suppress. The affidavit and agreements in regard to the manner of taking the depositions do not show any valid reasons for suppressing them.

Numerous questions are presented on the rulings of the court in refusing to strike out parts of the depositions. We have examined each of them, and find no error for which the judgment should be reversed.

We come now to the consideration of the question of the ruling of the court in refusing to require the relatrix to give bond for costs. Appellant made no proof as to the non-

residence of the relatrix, in support of the motion, but relied upon the averments of the complaint, and the court made no order requiring her to give bond for costs. In law, *prima facie*, the domicil of the husband is the domicil of the wife. The husband being a resident of this State, the wife could not be required to give bond for costs in an action against her husband to recover the custody of her infant child.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 5, 1892; petition for a rehearing overruled April 30, 1892.

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131 492
143 412

No. 15,749.

THORNTON, BY NEXT FRIEND, v. THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

RAILROADS.— *Contributory Negligence.* — *Reply.*—*Sufficiency of.* — Where a traveller in attempting to cross a railroad track looks in but one direction, from which he is expecting a train, and, in going upon said track, he is struck by a train coming from the opposite direction and is injured; and if, before entering upon said track, he could have looked in the opposite direction to a considerable distance along said track, and could have seen the approaching train which struck him, but failed to look in that direction, and is injured by said train, he is guilty of contributory negligence and can not recover.

SAME.—A traveller has no right to look for danger from a given point and then close his eyes and pass upon the track, and the failure of the company to give the proper signals is no excuse for his lack of diligence.

From the Marion Superior Court.

W. W. Woollen, *J. B. Kealing* and *M. M. Hugg*, for appellant.

J. T. Dye, for appellee.

MILLER, J.—The sufficiency of the reply to withstand a demurrer filed by the appellee is the only question in this case.

The complaint charged that the defendant's road crossed a public highway near the village of Mount Jackson; that immediately east of said highway said company had a telegraph office from which orders were issued for the movement of the trains of said company over said railroad, and just at this point there was a switch on the north side of said railroad, which was used for the passage of the trains. The highway was much used by the public, and many trains crossed it daily. The crossing was a dangerous one—so much so that a signal was placed west of it, which required the blowing of the whistle and the ringing of the bell on all trains coming from the west over said railroad. At and before that time two trains were accustomed to pass at that point every evening. In doing this, the train going west remained on the main track of said railroad just east of said crossing, and the train going east, after giving the accustomed signal, passed on to said switch and around the one that was on the main track. One Doctor Sellers was then living just south of said railroad and west of said highway, and Frank Thornton, the plaintiff, was living with him. The plaintiff was well acquainted with the immediate surroundings of the said railroad crossing and the manner of running the trains on said railroad; he was seventeen years old, and blind in the right eye. On the evening of the day he attempted to cross the said railroad on said highway, the train going west was yet on the main track, and it appeared to him to be in the act of starting west. Its distance from him was such that he could safely cross said railroad without danger of being injured, provided he watched its movements. Relying upon said railroad's employees discharging their duty, he walked on to said railroad in his attempt to cross it, and was struck by a locomotive engine coming from the west on said railroad, run over by it and the train of cars attached

to it, and injured; that the injuries thus received by him were caused, not by any fault or negligence on his part, but by the gross negligence of said railroad and its employees, in not blowing the whistle on said locomotive engine which came from the west, three times at a point not less than eighty nor more than one hundred rods from the crossing of said highway, and in not ringing the bell attached to said locomotive engine until said engine had fully passed said crossing, as by said danger signal and the statute of the State they were required to do. And the plaintiff avers it is true that said railroad company and its employees did not give any notice whatever of the approach of said locomotive engine by either blowing the whistle or ringing the bell on said locomotive engine."

The defendant answered the complaint as follows:

"That, on the day of the accident set forth in the complaint, in the evening, said Thornton started from the residence of one Doctor Sellers, being the first residence fronting on the highway in the complaint mentioned, south of said railroad to the said town of Mount Jackson, most of which is on the north side of said railroad; that immediately before the accident occurred plaintiff was standing on the porch of a residence within one hundred and fifty-five feet of the highway crossing at which said accident occurred; that at said point he could see west for about one-quarter of a mile on the railroad and about three-quarters of a mile east; that at the very moment of starting from that point to cross the said railroad he looked west for a train of cars and saw none, and he looked east and saw one standing near said crossing apparently in the act of moving westward; that knowing there was a post west of said crossing which by its marks required the engineers of trains going east to whistle and ring the bell before passing said crossing, and by his acquaintance with the conduct of said railroad, knowing that such trains should whistle and ring, and having but one eye (he being blind in the right eye), as he passed on to said railroad he listened carefully for

the whistling and the ringing of the bell on the train that might be coming from the west on said railroad, and heard none, and used the only eye he had to watch the movements of the train that stood just east of the crossing, so that he might not be injured by its movement; that said Thornton was on said day blind in his right eye, and consequently had, in order to look eastwardly, in facing northward, to turn his head eastward; that while in the act of watching, the train standing on said railroad just east of said crossing, and just as he passed upon said railroad, struck said Thornton. And the defendant further says that from the point one hundred and fifty-five feet south of railroad, where the plaintiff last looked to the west, until said plaintiff reached said railroad, he had an open, unobstructed view of the track for a long distance, and could have easily seen the approaching train if he had only looked."

In the reply the averments of the answer to and including the sentence: "And that while in the act of watching the train standing on said railroad, a locomotive and train coming from the west over said railroad struck said Thornton," are admitted to be true, and after making a diagram of the place a part of it, it concludes as follows, to wit: "Plaintiff further says that immediately after looking west for a train on said railroad he started from that point to cross the said railroad, and that he did not stop until he was struck by the train coming from the west on said railroad; that at the moment of starting to cross said railroad he noticed that the men in charge of the train standing east of the crossing were taking their respective positions, and that the said train would immediately move, and knowing that the trains passed at that point at that hour of the day, he believed and acted upon the belief that the train due from the west before he came out on the porch had passed the one standing there; yet, that no accident might happen to him, he listened carefully for the whistling and ringing of an incoming train

from the west, while he watched the one that was standing on the track just east of the crossing; that his hearing was good, and yet he heard no whistle or ring of a bell from the train which did come from the west and run against him and knocked him into the cow-pit and injured him as stated in his complaint. Wherefore the plaintiff says that he did exercise that degree of dilligence which was, under the circumstances, reasonably practicable and available."

That the conduct of the defendant in failing to give the statutory signals constituted actionable negligence is not disputed, but it is contended that the collision might have been avoided if the plaintiff had exercised the sense of sight, and looked in the direction of the approaching train before he entered upon the track.

The answer avers that "from the point one hundred and fifty-five feet south of the railroad where the plaintiff last looked to the west until said plaintiff reached said railroad, he had an open, unobstructed view of the track for a long distance, and could have easily seen the approaching train if he had only looked." This very material averment of the answer is not denied.

The reply attempts to avoid the force of this averment by stating that he acted upon the belief that the train due from the west had passed before he came out on the porch, and that he watched the train that was standing on the track just east of the crossing; that at the moment of starting to cross the track he noticed that the men in charge of the train were taking their respective positions, and that the train would immediately move; that in order that no accident might happen to him he listened carefully for the whistling and ringing of an incoming train from the west.

From these averments we must infer that while the plaintiff believed that the train from the west had passed, he was apprehensive that such might not be the case, and, therefore, listened carefully for the sounding of a whistle and ringing

of a bell to announce its approach. We may also infer that he continued to listen for the signals of its approach from the time he left the porch, one hundred and fifty-five feet distant, until he stepped upon the track. This was a sufficient exercise of the sense of hearing.

It was not only the duty of the plaintiff to listen for the approach of a train that he knew was due about that time, but to look in the direction from which the train would come.

In *Mann* v. *Belt R. R., etc., Co.*, 128 Ind. 138, it was said: "When about to enter upon the crossing, looking in one direction only is not the diligence required by the law, for the law requires him to look in both directions if it is possible to do so."

In the late case of *Nixon* v. *Chicago, etc., R. W. Co.* (Iowa), 51 N.W. R. 157, it was held that a traveller who looked only in one direction, because he expected a train from that direction, and was injured by a train coming from the opposite direction, which he might have avoided if he had looked, was guilty of contributory negligence, although the usual crossing signals were not given.

That it is the duty of one who approaches a railroad crossing to both look and listen, and that the failure of the company to give the statutory signals does not excuse this precaution has been so often stated and decided that we deem it unnecessary to make any extended citation of authorities. *Cadwallader* v. *Louisville, etc., R. W. Co.*, 128 Ind. 518; *Mann* v. *Belt R. R., etc., Co., supra; Ohio, etc., R. W. Co.* v. *Hill*, 117 Ind. 56; *Indiana, etc., R. W. Co.* v. *Hammock*, 113 Ind. 1.

The appellant's counsel, in their brief, do not controvert this general proposition of law, but contend that the plaintiff both looked and listened; looked at the train standing still on the east, and listened for the train from the west.

If the only opportunity the plaintiff had for seeing the approaching train was at the moment he was about to step upon the track, when the standing train was about to move, the necessity for watching it might have afforded an excuse for not looking in the other direction, and the reasoning and authorities cited by appellants would be in point. But the reply furnishes no excuse for not looking to the west, and seeing the approaching train, at some time while going from the Sellers porch to the crossing. The plaintiff may not have been negligent in failing to look to the west, at the instant of time, or shortly before he entered upon the track, but he was grossly negligent in failing to look in that direction at some point between the house and the crossing, when, the view being unobstructed, and the train in plain sight, he might have avoided the injury.

The fact that the train from the west was due before the train from the east, which was standing on the track, did not excuse him from the duty of looking for its approach. In the case of *Nixon* v. *Chicago, etc., R. W. Co., supra*, it was argued that the plaintiff was excused for not looking for the approach of the train from the south, by which he was injured, because it was due before the train from the north. In disposing of this contention the court said: "It is enough to say, in answer to this, that the traffic and running of trains on railroads is such that there can be no excuse for a traveller to coolly and calmly approach a railroad track, and look but one way."

While the plaintiff was not required to enter into a calculation of the comparative speed of a traveller walking toward a railroad track, and a train of cars passing along that track at ordinary speed, he must, as a matter of common observation, have known that while he would walk one hundred and fifty-five feet, the train would cover a considerable distance, sufficient at least to require him to look for its approach at some point during his journey. He had no right

to look from a given point, and then close his eyes and pass upon the track. *Mann* v. *Belt, etc., R. R. Co., supra.*

In our opinion the answer was good, and, therefore, the reply was not good enough for a bad answer.

Judgment affirmed.

Filed May 10, 1892.

15,692.

The Fort Wayne Electric Light Company *v.* Miller et al.

CONTRACT.—*Subscription to Secure Removal of Manufactory.—Conditions Precedent.—Recovery of Money Paid.—Performance of Agreement.*—Citizens of Plymouth were negotiating with an electric light company to move its business of manufacturing incandescent lights to such city, and the company wrote that it was "not expedient to" do so, but added: "We, however, feel that we are under obligations to recognize your efforts, and we will, however, move all the manufactory of the Jenney Arc Lamps and Dynamos from Fort Wayne to Plymouth on condition of you giving our company ten acres of ground suitably located for our works, and $15,000 in cash, to be invested in buildings and machinery on said grounds, and will take $115,000 of the capital stock of our company," paying therefor in the following manner: 25 per cent. cash on a date given, and the remainder in three equal installments on dates named. Three days after, the agents of such citizens called on the company and asked for an invoice of its property, and to investigate its financial condition, but the officers thereof said it was impracticable to do so then, owing to the state of their business, and in lieu thereof the company executed the following writing: "We will guarantee that our invoice will show a surplus of $300,000 of good assets over and above our liabilities, counting patents and good will at $100,000 on April 1, 1888. This guarantee is made because the company has not invoiced this year, and to satisfy you that we will not declare any dividend that will impair the assets below the sum as shown in the invoice, of which

we give you a copy, dated January, 1887, and that we will in addition change our letter of March 24 [quoted above] to conform to your subscription to stock, $115,000 and bonus of $15,000, which is that the $15,000 is to be paid within ten days, and 25 per cent. of stock so soon as we commence moving machinery to Plymouth, and 25 per cent. every three months thereafter until paid." The propositions in these two letters were accepted by the citizens, and the company was informed that they had "raised the proper amounts," and that they would fully comply with the terms of the propositions. Subsequently the plaintiffs, who were citizens of Plymouth, subscribed, for the purpose of inducing the company to bring its "factory" to the city, fifteen thousand dollars; they and others also subscribed for stock of the company amounting to $115,000, the money to be paid in installments of 25 per cent. every three months, "the first installment to be paid when said company shall commence removing the machinery of their arc light manufacturing plant to the city of Plymouth." Both of these subscriptions were turned over and accepted by the company. A tract of ten acres was also conveyed to it, upon which it erected a shop at a cost of $11,000, and placed a boiler, or engine, and some other machinery, therein, and then called upon the stockholders for the payment of 25 per cent. of their subscriptions. Payment was refused, and suit brought to recover back the $15,000, on the ground that the company had not complied with its contract.

Held, that the persons who subscribed the $15,000, the persons who subscribed for the stock, and the donators of the land were all acting together in a common enterprise, and their promise and acts together constituted the consideration for the promise to remove the manufacture to Plymouth.

Held, that the failure of the company to make the invoice was a breach of contract.

Held, that the averment that the company had never "moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from Fort Wayne to said city of Plymouth, nor did said company even begin the removal thereof," was sufficient to show a non-compliance with the contract on the part of the company, and to excuse the payment of the subscriptions or the tender of the amount thereof.

Held, that, construing all the writings together, the machinery referred to was the machinery of the manufactory at Fort Wayne.

Held, that the condition on the part of the company could only be complied with by a *bona fide* commencement of the removal of the machinery actually belonging to and used in its business at Fort Wayne; and until a commencement, or a beginning, of this character was made, there was nothing due on the stock subscriptions.

Held, that the erection of the building was not in any sense or degree the rendition by the company of any part of the consideration.

Held, further, that the invoice was to be furnished within a reasonable time; and to show what was such a reasonable time it was competent to show what the directors of the company said, when they gave the guaranty, about the time when it would be practicable and convenient for them to make the invoice.

From the Adams Circuit Court.

R. S. Taylor, *J. Morris* and *J. M. Barrett*, for appellant.

J. E. McDonald, *J. M. Butler*, *A. H. Snow*, *J. M. Butler, Jr.*, and *C. Kellison*, for appellees.

McBride, J.—The appellant is a corporation, engaged in the manufacture of electric lighting apparatus at Fort Wayne. In the spring of 1888 negotiations were entered into looking to the removal of all or a part of its business to Plymouth, Marshall county. The negotiations were conducted on the part of the appellant by its directors, and on the other part by a committee, representing certain of the citizens of Plymouth.

As the result of an interview between the citizens' committee and the directors, the following was delivered to the committee:

"Fort Wayne, Ind., 3–24, 1888.

"*Mr. E. R. Wheeler, H. G. Thayer, J. W. Parks, Ira D. Buck and C. T. Mattingly, Committee, Plymouth, Ind.:*

"Gentlemen—On consideration of your proposition we have decided that it will not be expedient to move from Fort Wayne any part of our busines of manufacturing incandescent lights. We, however, feel that we are under obligations to recognize your efforts, and we will, however, move all the manufacture of the Jenney Arc Lamps and Dynamos from Fort Wayne to Plymouth on consideration of you giving our company ten acres of ground suitably located for our works, and $15,000 in cash, to be invested in

buildings and machinery on said grounds, and will take $115,-000 of the capital stock of our company, paying therefor in the following manner: 25 per cent. cash on April 15, 1888; 25 per cent. July 15, 1888; 25 per cent. October 15, 1888, and 25 per cent. January 15, 1888.

"Very truly yours,
"H. G. OLDS,
"J. H. BASS,
"P. A. RANDALL,
"R. T. McDONALD,
"M. W. SIMONS,
"*Directors of the Fort Wayne Jenney Electric Light Co.*"

Three days later the committee, having conferred with their constituents, returned to Fort Wayne for the purpose of investigating the financial condition and standing of the company, preliminary to closing a contract with it. After another conference with three of the directors of the company, a paper was executed and delivered to them in the following terms:

"FORT WAYNE, IND., March 27, 1888.

"*Mr. E. R. Wheeler and others, members of Plymouth Committee:*

"GENTLEMEN—We will guarantee that our invoice will show a surplus of $300,000 of good assets over and above our liabilities, counting patents and good will at $100,000, on April 1st, 1888.

"This guarantee is made because the company has not invoiced this year, and to satisfy you that we will not declare any dividend that will impair the assets below the sum as shown on the invoice, of which we give you a copy, dated January, 1887, and that we will in addition change our letter of March 24th to conform to your subscription to stock $115,000 and bonus of $15,000, which is that the $15,000 is to be paid within ten days, and 25 per cent. of stock so soon

as we shall commence moving machinery to Plymouth, and 25 per cent. every three months thereafter until paid.

"Respectfully,

"FORT WAYNE JENNEY ELECTRIC LIGHT CO.

"By R. T. McDONALD, *Treas.*

"R. T. McDONALD.

"P. A. RANDALL.

"M. W. SIMONS."

April 7th the following was sent by the committee to the company.

"PLYMOUTH, IND., April 7th, 1888.

"*To the Fort Wayne Jenney Electric Light Co., Fort Wayne, Indiana:*

"GENTLEMEN—You are hereby notified that at a regular called meeting of the executive committee of the citizens of Plymouth, the undersigned chairman was delegated to inform you that we, the citizens of Plymouth, do hereby accept your written offer of date March 24th, 1888, and your letter of March 27th, 1888, making certain changes in your original proposition. The said citizens of Plymouth having raised the proper amounts accept your said offer, and will fully comply with the terms of said proposition.

"JOSEPH SWINDELL, *Pres't of Com.*

"Attest:

"IRA D. BUCK, *Sec'y.*"

Later, a subscription paper was circulated and executed, in the following words:

"We, the undersigned, do hereby agree to pay to the Fort Wayne Jenney Electric Light Company, of Fort Wayne, Indiana, the sums we have heretofore subscribed for the purpose of inducing them to bring their factory to Plymouth, Indiana. This subscription is to be paid for the purpose of inducing said factory to remove the arc light department of its factory to Plymouth, and it is to be paid by the 10th of April, 1888, and shall not be binding upon any sub-

scriber hereto unless the entire bonus required shall be subscribed."

On this, fifteen thousand dollars was subscribed and paid in cash, which was turned over to and accepted by the company."

A stock subsription to the capital stock of the company, amounting in the aggregate to $115,000, was made, the subscription paper being in the following words:

"We, the undersigned, do hereby agree to pay to the Fort Wayne Jenney Electric Light Company, of Fort Wayne, Indiana, the several sums set opposite our respective names for the number of shares by us subscribed and set opposite our respective names. Said sums to be paid in instalments of 25 per cent. every three months, the first instalment to be paid when said company shall commence removing the machinery of their arc light manufacturing plant to the city of Plymouth, Indiana."

This was also turned over to and accepted by the company. In addition to this a tract containing ten acres of land was conveyed to it by an unconditional warranty deed, and accepted by it. It erected a building, or shop, on the land at a cost of about $11,000, placed a boiler, an engine and some other machinery in the building, and then called upon the stock subscribers for the payment of 25 per cent. of their subscriptions, but payment was refused; the subscribers claiming that the company had not complied with the terms of the contract.

This suit was commenced September, 1889, by certain of the cash subscribers who aided in raising the $15,000, which was paid to the company, for themselves and such others of the subscribers to that fund as might elect to join with them to recover back the money thus paid.

The complaint recites the making of the contract, and avers of the writing executed March 27, that when the committee called to investigate the financial condition and standing of the company, they were informed by Simons, who was a di-

rector in the company, and McDonald and Randall, who were respectively its treasurer and secretary, that it would be impracticable, because of a rush of business in the manufacturing department, to shut down the factory at that time for the purpose of taking an invoice, and to allow the committee to examine into the condition of its assets, but that they would make such invoice, and allow such examination as soon as practicable, and that to satisfy the committee for the time being they executed that writing. It is averred that the promise and guaranty contained in said writing was one of the principal inducements causing them to take the course they did thereafter, without making a thorough examination as to the appellant's financial standing. The complaint avers full performance of the contract on the part of the appellees and those associated with them, alleges the delivery to the appellant of stock subscriptions for $115,000, which were retained and are still retained by the appellant, the payment to it of the $15,000 in cash and conveyance to it of the ten acres of land, and that both money and land were received by the company and appropriated to its own use, and also alleges entire failure to perform on the part of the appellants.

It is particularly averred that the appellants had failed and refused to make or furnish to appellees, or to the stock subscribers, the invoice mentioned in the writing of March 27. The complaint also avers that said company has "never used or occupied said grounds and buildings for manufacturing Jenney arc lamps, lights or dynamos, nor has said company ever moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from Fort Wayne to said city of Plymouth, nor did said company ever begin the removal thereof, etc."

While there are several assignments of error, only three propositions are properly before us for decision.

1st. The sufficiency of the complaint.

2d. The measure of damages, and

3d. The admissibility of certain testimony.

It is conceded that the facts averred show the execution of a valid contract. Counsel, however, do not agree in the construction of the contract. Counsel for the appellant construe it as one entire and single contract between the electric light company on the one hand and the citizens of Plymouth on the other, upon an entire consideration, but insist that the complaint avers a contract differing in some respects from that made by the papers. Counsel for the appellees style it "an entire quadripartite contract." We do not regard the discussion of this question as calculated to throw any light on the real controversy.

While it is true that the undertaking of the subscribers to the cash fund was in one sense distinct from that of the parties to the stock subscription, or the donors of the land, and while their undertakings were not only collectively different, but that of each individual subscriber was several, and his own several personal obligation, yet all were acting together in a common enterprise for the accomplishment of a common purpose. The cash subscriptions, stock subscriptions and land donations together constituted the consideration for the promise of the appellant to remove its manufacture from Fort Wayne to Plymouth. On the other hand the sole and only consideration moving from the appellant to the other party, as expressed in the contract, was its promise in its proposition of March 24th, that it would "move all the manufacture of the Jenney arc lamps and dynamos from Fort Wayne to Plymouth."

The particular in which the appellant insists that the complaint avers a contract differing from that made by the papers, is in relation to the invoice. Appellant treats this as an attempt to inject a parol modification into the written contract. We do not view it in that light. We think the guarantee of March 27th, fairly construed, imposes upon the appellant the duty of making an invoice that would show the condition of the company on the first day of April, 1888, and while no time is fixed within which it is to be made, the

law would imply a promise to make it within a reasonable time. The averments in the complaint relating to the invoice are, therefore, in our opinion, fairly within the terms of the contract, and the allegation of failure to make it is an allegation of a breach of one of the company's material undertakings.

It is also argued by the appellant that the averments of the complaint, taken together, do not show performance by the appellees, or non-performance by the appellant, but, on the contrary, show only partial performance by both. It is said that there is no showing of the payment or tender of 25 per cent., or any part of the stock subscription, and that there is no averment that the company never commenced moving machinery to Plymouth. It is true that there are no averments of the payment or tender of any portion of the stock subscriptions. We think, however, that sufficient excuse is shown for not making such payment or tender. Counsel argue that the obligation of the stock subscribers to pay 25 per cent of their subscriptions became absolute when the company commenced to move machinery from Fort Wayne to Plymouth, and that there is no averment that they had not thus commenced to move machinery; that the averment that they had never "moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from Fort Wayne to said city of Plymouth, nor did said company ever begin the removal thereof," is not sufficient. They say the "removal of the *manufacture*, and the removal of *machinery to manufacture with*, are two different things." In this we agree with them.

They are, however, measuring their obligation entirely by the language of the guaranty of March 27. The terms of the contract and the full measure of the obligations assumed by the parties can only be determined by construing all of the writings together. The paper of March 27, aside from the guaranty and agreement to make an invoice, was a mere modification of the proposition of March 24. As will be

seen by reference to it, that proposition was that they would, upon certain terms "*move all the manufacture* of the Jenney Arc Lamps," etc., and definite dates were fixed for the payment of the stock subscription. No definite time was fixed for the payment of the $15,000. The modification made the $15,000 due and payable within ten days, and the first installment of stock subscription, instead of being payable April 15, was to be paid as soon as the company should commence moving machinery to Plymouth. What machinery? Would the moving of any machinery meet the condition? It is evident that the machinery intended by the parties was that referred to in the original proposition—the machinery of the manufactory at Fort Wayne. The citizens of Plymouth were endeavoring to secure the transfer to their city of a manufacturing concern which they were assured had assets exceeding its liabilities in the sum of $300,000. The proposition made to and accepted by them was, that this established and productive industry in its entirety should be moved from Fort Wayne to Plymouth. The condition could only be complied with by a *bona fide* commencement of the removal of the machinery actually belonging to and used in said business at Fort Wayne. Until a commencement, or a beginning, of this character was made there was nothing due on the stock subscriptions.

We think the complaint states a good cause of action.

The question as to the measure of damages is sought to be presented in several different ways, and is, we think, properly and fairly in the record by the ruling of the court on instructions asked by the appellant and refused, and on an instruction given by the court.

The instructions asked were long, and we will not copy them.

In substance the court was asked to instruct the jury as follows:

That the burden was on the plaintiff to show all the facts necessary to fix the damages, which the jury were required

to ascertain and fix separately as to each plaintiff; that while their verdict should be for a gross sum, it should be a sum made up of the separate damages suffered by each plaintiff; that if the contract was broken the plaintiffs had the option of demanding a rescission, or of affirming the contract and suing for the breach; that if the plaintiffs had elected to rescind they would have been entitled to a return of their money upon placing the other party *in statu quo*, but that by bringing this suit they had elected to affirm the contract and claim damages for its breach; that the damages they were entitled to recover were compensatory, and might be much more or much less than the amount paid; that from the averments of the complaint it must be taken that the benefits which the plaintiffs expected to gain by the performance of the contract consisted in the growth and prosperity of the city of Plymouth, the increase of its population, the enhancement of the value of property in said city, and the various advantages which would accrue to them from the location and maintenance of an electric light manufacturing industry in their city; that if the company had broken the contract the measure of damages would be the loss which they suffered of gains, profits or advantages which would have accrued to them if the contract had been kept; that unless the plaintiffs had proven that they had suffered loss or damage by reason of the breach of the contract, other than the subscription of the $15,000 they could recover no more than nominal damages; that unless there was evidence of loss suffered the verdict for damages should be limited to nominal damages; that while it is the law that one who has paid his money upon a consideration which has wholly failed may recover back the money paid, the rule does not apply when any part of the consideration has been received by him, or parted with by the other party; that the building of the shop on the donated land, with part of the donated money, was to the extent of the money invested part performance by the appellant of the contract, and that the appellees had

thereby received a part of the consideration on which they had parted with their money, and were not entitled in this suit to recover back their money.

The court refused all of the instructions asked, and, over appellant's objection, gave the following:

6. It is well settled law that a party who agrees to perform an act and fails to keep his agreement, must pay compensation for all injuries that naturally and proximately result from the breach. So far as the plaintiffs in this suit, and those they represent, are concerned, it does not appear, and is not claimed by the defendant company, that there is any other consideration for the payment of the money subscribed by them to the donation fund than the agreement for the removal of that part of the manufactory of the defendant company for the manufacture of the Jenney Arc Lamp and Dynamo from Fort Wayne to Plymouth, and a failure to perform that stipulation operates as a failure of consideration for the money so paid. In cases of that kind, where the defendant has received money of the plaintiff upon a consideration which has failed, or where the defendant has money of the plaintiff which, in equity and good conscience, he ought to refund, in the absence of any allegation of special damages and proof thereof, the plaintiff in general is entitled to receive the money back and lawful interest thereon from the time of payment up to the time of recovery. Therefore, in this case, if the jury believe from the evidence that the consideration upon which the plaintiffs and those they represent in this suit paid their money and upon which the defendant company received it has failed, there being no allegation of special damages, the measure of damages would be the several amounts paid, with interest thereon from the time of payment up to this date at the rate of 6 per cent. per annum.

In our opinion the instruction given is a correct statement of the law, and is clearly applicable to the case made

by the pleadings and by the evidence. We also think the court did not err in refusing the instructions asked.

As we have already said, as we construe the contract, the sole and only consideration for the payment of the money was the promise to remove the manufacture—the particular manufacturing enterprise named—to Plymouth. It is not only averred, but is found as a fact by the jury, this was never done or commenced. It can not be said that the erection of the buildings was in any sense, or in any degree, the rendition of any part of the consideration. Both land and the money which paid for buildings and machinery were given to the appellant as part of the consideration for what it promised to do. Counsel say that to allow the appellant to invest the money in the buildings, and then compel it to refund it, is to make it an involuntary purchaser of the property. The money was paid to it to be used in that specific way, it is true, but only upon conditions. Without compliance with the conditions it had no right to either retain or invest it. The investment in buildings was, under the circumstances, wholly unauthorized, and it can not complain because it is required to refund it. In our opinion, upon the facts as they are found by the jury, there was an entire failure of consideration, and in such case, as the appellant concedes, the measure of recovery is the money paid, with interest.

The only remaining question is on the admissibility of certain testimony.

The court, over the objection of the appellant, allowed the appellees to prove by certain witnesses what was said by the directors of the appellant at the time of making the written guaranty of March 27th, as to when it would be practicable and convenient for them to make the invoice mentioned in that writing.

It was objected that this was an attempt to "contradict, vary or explain a written contract by evidence of preceding and contemporaneous conversations and verbal statements,

and evidence of intentions and understandings, all of which were merged in the written contract finally executed."

We have already construed the contract as imposing upon the appellant the duty of making and furnishing an invoice within a reasonable time. What would be a reasonable time must be determined from the evidence. We think it was competent and proper to show in that connection, as bearing upon that question what the directors said when they gave the guaranty, about the time when it would be practicable and convenient for them to make the invoice.

Judgment affirmed, with costs.

Filed Feb. 4, 1892; petition for a rehearing overruled April 30, 1892.

131 512
132 600
131 512
162 593

No. 15,212.

The Lake Shore and Michigan Southern Railway Company v. Smith, Treasurer.

Railroad.—*Appropriation to Aid.—County Commissioners.—Change of Township Boundaries.—Transfer of Property Thereby.—Liability of for Appropriation.—Tax Levy.—Notice.*—The board of commissioners of a county, at the June session, 1882, ordered that a tax be levied upon all the taxable property within a certain township in said county, to aid in the construction of a proposed railroad, an election held in said township having resulted in favor of such an appropriation. At the time said tax was ordered to be levied, all of the appellant's property in said county was situated and assessed for taxes in a township which had voted against an appropriation for said railroad. The board of commissioners, in March, 1883, changed the boundaries of said township, and by such change the property of the appellant in said county was transferred to the township which had voted in favor of the appropriation.

Held, that the property of the appellant so transferred after the order for the levy was made but before the tax was in fact levied, was liable for its proportion of the same.

Held, also, that no notice is required of the levying of a tax authorized or directed by law.

Same.—*Appeal from Order of Board.*—An appeal from the order of a board

of county commissioners levying a tax in aid of a railroad, goes to the circuit court for trial as an original cause, and vacates the order of the board, and the judgment of the circuit court ordering the levy, which judgment was rendered after the change of boundaries, would make the appellant's property liable for its proportion of the tax.

SAME.—*When Levy Should be Made.—Right to Make After Time Fixed.*—Though the law requires the levy to be made at the June session of the board of county commissioners next after the rate, the duty to make it is absolute, and the power to make it is not lost by a failure to exercise it at the right time.

TAXES.—*Change of Boundaries.—New Property.*—When the territorial boundary of a body politic, or corporation, is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner, and to the same extent as the property previously included within the corporation, and this is so even though such taxation be for the purpose of paying pre-existing debts of the corporation.

COUNTY COMMISSIONERS.—*Change of Township Boundaries.—Collateral Attack.*—The board of commissioners of a county are authorized to make such alteration in the boundaries of townships as they may deem proper, and their action in doing so, unless shown to be absolutely void, can not be attacked collaterally. *Alvis* v. *Whitney*, 43 Ind. 83, distinguished.

McBRIDE, J., dissents.

From the Lake Circuit Court.

J. H. Baker, G. C. Greene and *O. G. Getzendanner*, for appellant.

R. C. Bell and *S. R. Morris*, for appellee.

OLDS, J.—The appellant, the Lake Shore and Michigan Southern Railway Company, brought this suit against one John P. Merrill, as treasurer of Lake county, Indiana, to restrain the collection of a tax in aid of the construction of a railroad.

The appellee, Charles C. Smith, successor in office of Merrill, was afterwards, by order of the court, substituted as defendant.

It appears from the record that twenty-five freeholders of Hobart township, in Lake county, presented to the board of commissioners of said county, on the 19th day of April, 1881,

their petition asking that an appropriation of ten thousand dollars might be made to aid the New York and Chicago Railway Company, or its successors by consolidation, a corporation duly organized under the laws of the State of Indiana, to construct its railroad in and through said Hobart township; that an election was ordered and duly held on May 30th, 1881, which resulted in favor of such appropriation; that at the June session, 1882, the board of commissioners of said county ordered that a tax of one per centum of the valuation be levied upon all taxable property within said township of Hobart; that up to and at the time said tax was levied, the appellant's railroad, and all of its property situate in said county and liable for taxation in said county, was situate in North township in said county, and was assessed for taxes in June, 1882, in said North township; that there was also an election held in North township to pass upon the question of appropriating a sum of money to aid in the construction of said proposed railroad, and the majority vote was against such appropriation.

The board of commissioners of said county, at the March session, 1883, changed the boundaries of said townships of Hobart and North, by attaching a strip off the west side of said Hobart township to another township, and by taking from North township a strip lying north of Hobart township and attaching it to said Hobart township, and the property of the appellant was situated in that portion of North township which was taken from North township and attached to Hobart township.

The appellant filed its complaint in this cause, alleging the foregoing facts, and filing copies of the several orders of the board of commissioners referred to, and alleging that in 1884 the auditor of said county, without any authority of law, in making up the tax duplicate, extended and placed thereon a tax of one per centum upon all the valuation of all of the taxable property then owned by the appellant, and duly delivered the tax duplicate to the treasurer of the county, who,

unless restrained, will proceed to collect by distress and sale of appellant's property said tax so illegally levied.

It is averred that appellant has paid all of its legal taxes, and that one member of the board of commissioners was at the time of the change in township boundaries a resident of the territory taken from Hobart township.

The answer admits the allegations of the complaint, but avers that certain resident freeholders of Hobart township appeared before the Board of Commissioners at the June session, 1882, and filed their remonstrance to the levying of said tax; that the remonstrance was overruled and the tax levied, and they filed their appeal bond and duly appealed said cause to the circuit court, where final judgment was rendered in October, 1883, dismissing the remonstrance and against the remonstrators for costs, and they again took an appeal to the Supreme Court and the judgment was affirmed, being the case of *Jussen* v. *Board, etc.*, 95 Ind. 567. It is further alleged that on June 7, 1884, after the disposition of said cause in the Supreme Court, the said Board of Commissioners made an order ordering said tax levied and collected; that afterwards, in August, 1884, the New York, Chicago and St. Louis Railway Company filed their complaint in the Lake Circuit Court against all the persons who were plaintiffs in the original case of the said *Valentine Burke* v. *Board, etc.*, being the same case as *Jussen* v. *Board, etc., supra,* praying the court to correct a mistake made by the clerk of the Lake Circuit Court in entering and writing up the order of said court in the original case hereinbefore referred to; that all of the said defendants to said cause appeared in the Lake Circuit Court, and such proceedings were had in said court that on the final hearing of said cause it was adjudged and decreed that said original order should be and was amended "now for then," so that it was made to read according to the decree of said court referring to and making a copy of the decree so entered, marked Exhibit "F," a part of the answer, which exhibit shows a finding of all the facts, the filing of the petition,

the vote taken and canvassed, resulting in favor of the tax, and the appeal, and the court levied the tax of $10,000 on the property of Hobart township, and ordered the county auditor to place the same upon the duplicate and the treasurer to collect the same.

It is further averred that at the June session, 1881, of said board of commissioners, on motion of the New York Central and St. Louis Railway Company, it was ordered that the balance appropriated and remaining unpaid should be levied and collected from the taxable property of the inhabitants of said Hobart township, sufficient to make the sum of ten thousand dollars. Copies of the various orders are set out and referred to as exhibits, both with the complaint and the answer.

A demurrer was addressed to the answer and overruled, and exceptions reserved.

A reply was filed to the answer, to which a demurrer was addressed and sustained, to which ruling the appellants at the time excepted.

Errors are assigned on the rulings of the court in overruling the demurrer to the answer, and sustaining the demurrer to the reply.

We need not set out the reply, as both rulings present the same question.

All technical objections to the answer, on account of failure to aver the substance and legal effect of the exhibits set out, are waived, and it is agreed that the answer should be treated as containing the proper averments, and the exhibits treated as a part of the answer.

Disregarding any technical defects in the pleadings, the question presented is as to whether or not the property of the appellant is liable for its proportion of the aid voted by Hobart township. The board of commissioners of Lake county, after the voting of the appropriation by said township, by their action in changing the township boundaries, placed a portion of the property of the appellant theretofore located

in North township into and made it a part of Hobart township, such change having been made before the tax was levied upon the property of the township to raise the amount voted in aid of the proposed railroad.

A petition was filed by a proper number of freeholders of Hobart township, asking an election. The election was ordered and held on May 30th, 1881, resulting in favor of an appropriation of ten thousand dollars to aid the New York and Chicago Railway Company, or its successors by consolidation, to construct its railroad in and through said Hobart township. At a proper meeting of the board of commissioners thereafter held, in January, 1882, before any changes in the boundary lines of said township were made, said board ordered that a tax of one per centum of the valuation be levied upon all the taxable property within said township. At the said June session, 1882, of the board of commissioners, a remonstrance was filed to the levying of said tax, and an appeal prosecuted to the circuit court. While the cause was still pending in the circuit court, the board of commissioners, at their March session, 1883, changed the boundaries of said Hobart township, cutting off a strip from the west side of said township and attaching it to another, and cutting off from North township a strip lying north of Hobart township and attaching the same to Hobart. Situate in the strip taken from North and attached to Hobart is the property of appellants. The record shows the cause appealed to the circuit court to have been finally disposed of in said court in October, 1883, and the court levied the tax of ten thousand dollars upon the taxable property of said township and ordered the county auditor to place the same upon the tax duplicate, and that the treasurer proceed to collect the same. After final judgment in the circuit court the board of commissioners ordered that in accordance with the order of the Lake Circuit Court, as affirmed by the Supreme Court, the proper county officers proceed to collect the taxes heretofore appropriated by Hobart township.

The appeal taken from the order of the board levying the tax at its June session, 1882, vacated the order of the board, and the matter was transferred to the circuit court for determination *de novo*.

As held in the case of *Gavin* v. *Board, etc.*, 81 Ind. 480, the case was transferred to the circuit court for trial as an original cause, and, as appears from the record, the final judgment as entered by the circuit court made the levy of ten thousand dollars on the taxable property of said Hobart township, and ordered it extended on the tax duplicate by the county auditor, and collected by the treasurer. This was done in October, 1883, after the appellant's property had become a part of the taxable property of said township.

It is suggested that the board failed to make the levy in the first instance at the June session next after the vote was had, and the action taken by the board thereafter was illegal; but this theory is contrary to the rule as laid down by this court. *Peed* v. *Millikan*, 79 Ind. 86; *Sackett* v. *State, ex rel.*, 74 Ind. 486.

As the case is presented, Hobart township voted an appropriation, and the township became liable for the payment of it. Afterwards, and before the amount was levied or became a lien upon the taxable property of said township (*Miles* v. *Ray*, 100 Ind. 166), the taxable property of said township was changed by an authorized act of the board of commissioners, by which some of the taxable property was excluded from the township and other property taken into the township.

Hobart township remained a body politic and corporate from the time it was created, although its boundaries may have been changed or its taxable property increased or diminished. It still remained the same corporate body, liable for all its obligations. The board of commissioners are authorized to make such alteration in the boundaries of townships as they may deem proper. Sections 5987, 5988, 5989 and 5990, R. S. 1881. The appellants held and owned their property situate

in North township, Lake county, subject to the right of the board of commissioners of said county to lawfully change the boundaries of the township in said county, and place their property in any other township in said county.

There are no facts pleaded showing the action of the board in making the change they did to be void, and it could not be attacked in these collateral proceedings unless their action was absolutely void. It must be held that such territory was properly and legally annexed to Hobart township.

The general and well settled rule is, that where the territorial boundary of a body politic or corporation is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner, and to the same extent as the property previously included within the corporation, and this is true even though such taxation be for the purpose of paying pre-existing debts of the corporation. *Stilz* v. *City of Indianapolis*, 55 Ind. 515; *City of Logansport* v. *Seybold*, 59 Ind. 225; *Town of Cicero* v. *Sanders*, 62 Ind. 208; *United States* v. *Memphis*, 97 U. S. 284; 1 Dillon Corp., section 185.

This is the only practical rule that could be applied. Obligations are constantly being created by municipal and other political subdivisions and corporations. Many of them can only be contracted and incurred by a vote of the property-owners or electors within the corporation, and the time of payment of many of them is extended for years in the future. The property of such corporations is constantly changing, both by removal and the changing of boundary lines, and the annexation of new territory. If the rule was not as it is, that all property within the corporation at the time of the levy and attaching of the lien is liable for taxation for all purposes, making a general and uniform system of taxation, we would be compelled to resort to a special system of taxation, returning and taxing each piece or article of property within the corporation at the time a particular

debt was contracted or obligation incurred for the payment of the same.

But there are other obstacles in the way of enforcing and collecting a tax upon the property which was excluded from Hobart township by the change in boundary. The appropriation was made by Hobart township; it is the obligation or indebtedness of that township for which the tax is levied to pay. At the time of the levy the property thus excluded from the township is no longer a part of the taxable property of the township. It has been legally removed from the township. The personal property owned by the residents of such territory and situate therein is as far removed from and beyond the power of taxation in such township as if there had been no change in boundary, and instead thereof the owners of the same had in March, 1883, removed from the township, taking the property with them; so, too, the real estate is transferred and became subject to taxation in another township, and having been transferred and become subject to taxation in another township, there is no power to tax it to pay a debt of Hobart township.

The power of taxation is legislative, and can only be exercised by the authority of the Legislature. *Merriwether* v. *Garrett*, 102 U. S. 472.

The statute authorizing the levying and collection of taxes to pay appropriations voted to railroads (section 4056) does not designate any particular property which shall be subject to taxation. It differs in no way from other statutes authorizing the levying of a tax. It provides that it shall be levied upon the real and personal property in the township. This manifestly must apply to the property in the township at the time the levy is made. The levy in this case was made upon the property in the township at the time of the rendition of the final judgment on appeal. If a lien attached to any of the property of the township at the time the aid was voted, or if its status was fixed by which it was collectible out of the property thus within the boundary of the township, it

attached to the personal as well as to the real property, and it would seem a novel theory that a lien would follow the personal property then in the township, though the tax was not levied for more than two years thereafter, and the property removed from the county. It is not a special assessment to be levied upon specific property, but a sum to be levied on all the property of the township and collected as other taxes. It is suggested that it is taking appellant's property without notice and without due process of law. This principle does not apply to taxation which is uniformly assessed against all property in the same municipality or political subdivision or corporation. No notice is required of the levying of a tax authorized or directed by law. It is suggested that the property of the appellant was situated in North township at the time of the giving of the notice and taking of the vote, and they were given no opportunity to be heard as guaranteed by the Constitution. We do not think the constitutional rights of the appellant were interfered with. The same claim could be made by any person moving into any municipality or political subdivision of the State, taking with him property subject to taxation if a tax were levied for a pre-existing debt of the corporation. The property of the appellant became a part of the taxable property of Hobart township by operation of law, by an authorized act of the Board of Commissioners, and it became and was liable to taxation the same as if it had been brought into the township in any other manner, or had been included within the corporate limits of the township at the time it was created.

We are cited to the decision in *Alvis* v. *Whitney*, 43 Ind. 83, as supporting the theory of appellant, that a tax can not be levied upon the property added by the change in boundary, but we do not think the decision against the theory we have ennunciated. In that case the controverted question was whether or not the railroad company was entitled to the appropriation, as it had not constructed the railroad through

the township as it had existed at the time the aid was voted. There was a change in the township boundary, and the railroad was constructed wholly outside the boundary of the township as it existed at the time of the vote, and upon these grounds the decision was made.

The conclusion we have reached being in harmony with the rulings of the circuit court, the judgment is affirmed, with costs.

McBride, J., dissents.

Filed May 11, 1892.

No. 15,796.

Havens et al. v. Gard et al.

Practice.—*Answer.—Filing During Trial.*—As to whether an answer should be permitted to be filed in a cause during trial is a matter of discretion with the court, and can only be taken advantage of when there is an abuse of discretion.

Jury.—*Filing Pleadings, After Swearing of.—Reswearing of.—Unavailable Error on Second Trial.*—Where pleadings are filed in a cause after the jury have been sworn to try said cause, and the jury is not resworn after filing said pleadings, and there is a second trial of said cause, the failure to reswear the jury in the first trial is not error to be taken advantage of in the second.

From the Tippecanoe Superior Court.

J. V. Kent, *G. W. Stubbs* and *J. W. Baird*, for appellants.

S. O. Bayless and *C. G. Guenther*, for appellees.

Elliott, C. J.—This was a proceeding in attachment. There were several plaintiffs having distinct causes of action, but the cases were consolidated in one proceeding and there was one trial. The plaintiffs succeeded upon the main

issue, but failed upon the issue joined on the affidavits in attachment.

The appellants moved for judgment in the ancillary proceeding upon the ground that, as the statements of the affidavits in attachment were not denied, they were entitled to enforce the attachment. As the record presents the case to us, answers denying the statements of the affidavits were filed before the motion of the appellants was interposed, so that the question is not whether, if there had been no answer, the motion would have been well taken, but the question is whether the motion having been filed after the answers were in, there was material error in overruling it. We think it clear that at the time the motion was filed the answers in denial prevented success upon the motion. At that time the motion was not well taken, since there was a direct issue. It is quite doubtful whether the appellants, by submitting the case for trial, did not waive an answer and treat the statements of the affidavits as controverted. If there was, as is now assumed, no issue, then the court and the parties did a vain and idle thing, inasmuch as they undertook to try a case where there was no controversy. We think the reasonable rule in such cases is to assume that an answer was waived and an issue impliedly joined. Many analogous cases warrant this conclusion. *Buchanan* v. *Berkshire, etc., Co.*, 96 Ind. 510, and cases cited; *June* v. *Payne*, 107 Ind. 307; *Purple* v. *Farrington*, 119 Ind. 164; *Thames, etc., Co.* v. *Canada, etc., Co.*, 127 Ind. 250 (54), and cases cited. But, however this may be, it is quite clear that there was no error in overruling the motion. If there was error at all, it was in abusing the discretion vested in the court by permitting answers to be filed, so that the point attempted to be made by the appellants is not presented by the record. But if it were presented, we could not hold that there was an abuse of discretion. This conclusion is so well settled that it is unnecessary to cite authorities.

The position of the appellants that the jury should have

been resworn after the answers were filed, if maintainable in any case, is certainly not maintainable in such a case as the one before us. There was no judgment upon the verdict of the jury, for there was a second trial and a finding by the court upon which the judgment from which this appeal is prosecuted was rendered, so that the question whether there was or was not error in failing to reswear the jury before whom the first trial was had is utterly immaterial.

We have studied the evidence, but we can not disturb the finding, for we are unable to say that there is no evidence sustaining the finding of the court.

Judgment affirmed.

Filed May 11, 1892.

No. 14,575.

KLINGLER *v.* SMITH ET AL.

PRACTICE.—*Error.—Improper Assignment of.—Motion for New Trial.*—Error can only be assigned on a question that was presented and ruled upon by the court below, and where a motion for a new trial in the court below was to the whole cause, and the assignment of error was in the ruling of the court "in overruling appellant's motion for a new trial on the cross-complaint," there is no question presented for the decision of this court on appeal.

From the Boone Circuit Court.

J. E. McDonald, *J. M. Butler*, *A. H. Snow* and *J. M. Butler, Jr.*, for appellant.

B. S. Higgins, for appellees.

OLDS, J.—William A. Klingler, an unmarried man, executed to Jesse Smith two notes, one for $1,500 and the other for $1,000. Afterwards said Jesse Smith cancelled said mortgage and took another mortgage on the same land, executed by said William A. Klingler, securing a note for $2,600; the

last note and mortgage he endorsed to his wife, Catharine Smith, who brings this action for the foreclosure of the same, making the appellant and her co-appellees defendants.

Issues were joined substantially as follows: The appellant, Mary A. Klingler, answers the complaint, alleging the giving of the first mortgage securing two notes, one for $1,500 and one for $1,000, and that the said Jesse Smith, for a valuable consideration, endorsed said $1,000 note to Polly Klingler, a sister of William A. Klingler, mortgagor, who, for a valuable consideration, endorsed the same to said appellant, Mary A. Klingler, then Mary A. Moore, but since intermarried with the mortgagor, William A. Klingler; and that the said Jesse Smith cancelled said mortgage, in so far as it was security for the $1,000, without any authority whatever, and avers the same to be a prior lien to the $2,600 mortgage.

Other defences were pleaded. Appellant also filed a cross-complaint, alleging the same facts, and asking a foreclosure of the prior mortgage securing the $1,000 note held by her, and that it be declared a prior lien.

The other parties to the suit are judgment creditors.

The appellee Catharine Smith answered the cross-complaint, and replied to the answers by alleging that the first mortgage and the note for $1,500 was given to secure a loan for $1,500, and that said William A. Klingler at the time was in embarrassed circumstances financially, and with a view of saving something out of his estate, requested and induced the said Jesse Smith to take another note for $1,000, signed by said Klingler, and included in said mortgage, and to assign the same to Polly Klingler, which he did, and Polly Klingler afterwards assigned the same to Mary A. Moore, who afterwards intermarried with the mortgagor; that said $1,000 note was given without any consideration whatever, and there was no consideration for the endorsements of the same; that afterwards said William A. Klingler was desirous of renewing the $1,500 note and borrowing an additional amount

of said Jesse Smith, and said Smith agreed to loan him a sum sufficient to make $2,600, including the $1,500 and interest, and the said William A. Klingler represented to said Jesse Smith that he held the note for $1,000, and had long before destroyed it, and procured the said Smith to cancel the first mortgage and take a new mortgage securing the $2,600 due him, which he did, and that the said Polly Klingler and Mary A. Klingler had full knowledge of all the facts.

The judgment creditors answered in denial and payment as to the $1,000 note. The cause was tried by the court, resulting in a finding and judgment in favor of the appellee Catharine Smith, and a foreclosure of her mortgage.

The appellant filed a motion for new trial in the usual form, stating as reasons that the finding and judgment is contrary to law and not sustained by the evidence, and on account of newly discovered evidence.

The motion for new trial related to all the issues joined, and asked for a new trial as to the whole cause.

The assignment of error is that the "court erred in overruling appellant's motion for new trial on the cross-complaint."

It is urged on behalf of the appellee Catharine Smith that the assignment of error presents no question for the decision of this court, and the question being presented we must pass upon it.

It is so well settled that error can only be assigned on a question that was presented and ruled upon by the circuit court that we need cite no authority in support of it. Error is assigned in this court on the rulings of the circuit court. Until the circuit court has ruled on a motion for new trial there is no ruling of the circuit court to be assigned as error on the ruling upon the motion. The error assigned in this case is the ruling of the court "in overruling appellant's motion for a new trial on the cross-complaint." No such motion for new trial was made in the circuit court, hence no error can be assigned on such a ruling. The motion filed

covered the whole case, and if the motion was not good as made it was not error to overrule it.

There is no proper assignment of error to present any question to this court for decision. Questions of this character must be first presented to the trial court, and the rulings of that court properly presented to this court for review. *New Albany, etc., R. W. Co.* v. *Day*, 117 Ind. 337; *Moore* v. *Harland*, 107 Ind. 475; *Bicknell* v. *Bicknell*, 110 Ind. 42.

The appellant did not ask the circuit court to give them what they now complain of and say the court erred in not giving to them, viz., a new trial on the cross-complaint.

There is no question presented for the decision of this court.

Judgment affirmed, with costs.

Filed Dec. 11, 1891.

ON PETITION FOR REHEARING.

OLDS, J.—The record in this case recites that the court overruled the motion of the appellant for a new trial on her cross-complaint. We did not refer to this in the original opinion, as we deemed it apparent that it was an error, and if not an error, it did not aid the appellant, but as our attention is specially called to it on petition for rehearing, and as counsel insist, the question as to their right to a new trial on the appellant's cross-complaint is presented by the record, we now notice it.

The only motion for a new trial in the record, as we stated in the original opinion, is a general motion for a new trial as to the whole case. The ruling must have been made upon that motion, and the error assigned is the overruling of a motion for a new trial on the cross-complaint, but if there was a motion filed by the appellant for a new trial as to her cross-complaint and a ruling made upon it and correctly shown by the record by its recital to that effect, then the motion to that effect is not in the record. There is a diminution of the rec-

ord, and the motion should have been brought into the record by *certiorari*. Without the motion in the record it can not be considered. There is nothing in the record showing any cause or reason for a new trial as to the cross-complaint. Either way the record is construed there is no question presented for decision. If the only motion filed was for a new trial as to the whole case and there is a clerical error in the record of the ruling showing the ruling to have been made on a motion for a new trial on the cross-complaint, there is no proper assignment of error. If, on the other hand, there was a motion for a new trial as to the cross-complaint ruled upon and assigned as error, then there is no such motion in the record.

The petition for rehearing is overruled.

Filed May 11, 1892.

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No. 15,750.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED RAILWAY COMPANY *v.* HANNING, ADMINISTRATOR.

MASTER AND SERVANT.—*Action for Damages.—Railroad.—Complaint.—Contributory Negligence.*—In an action by the plaintiff against a railroad company for damages for the alleged negligent killing of the decedent, a complaint is not objectionable on the ground that its specific averments show the decedent to have been guilty of contributory negligence when it avers that the decedent was required to perform a service outside of the line of his employment, and at a place other than that provided for the performance of his regular and ordinary duties; that its performance would subject him to great danger unless certain precautions were observed in the placing of signal flags, and that he believed the proper precaution had been observed, but which does not aver that the decedent made a personal investigation to ascertain if the proper signals were in fact displayed, and the place in which he was directed to work, thereby made safe.

SAME.—*Risks Assumed by Servant.*—A servant impliedly assumes all of the ordinary and usual risks incident to his service, so far as they are known to him, or so far as one of his age and experience ought, in the

exercise of ordinary care, to be able to discern them, even where the duties of the service are necessarily hazardous.

SAME.—*Unusual Employment.—Increased Danger.—Special Care of Master.—Assumption as to.*—If a master orders the servant to do some act outside of the duties ordinarily incident to his employment, and subjecting him to additional hazard, but which service could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken, and the failure of the master to exercise such care will render him liable.

SAME.—*Hazardous Employment.—Duty of Servant.*—In such a service, outside of the duties of his ordinary employment, the servant does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even though the dangers attending it are obvious. If the apparent danger is such that a person of ordinary prudence, exercising that prudence, would refuse to encounter it, the employee proceeds at his peril. Otherwise, he may undertake the service, using care proportioned to the apparent increased risk, and if in so doing, he is injured by the employer's fault, he may recover for the injury.

SAME.—*Relative Duties of.—Instruction to Jury.*—Where the plaintiff sought to recover damages against a railroad company for the alleged negligent killing of his decedent, who was ordered by the company's general foreman to perform a service outside of his regular line of duty and subjecting him to additional danger, and which killing was averred to be due to the failure of the company to display proper signals, an instruction to the jury correctly stated the law, which informed them, in substance, that in the absence of any rules on the subject of signals or previous direction to the decedent on that subject, it would have been the duty of the foreman to have displayed the signals if by so doing the place where the decedent worked would have been rendered safe, and his failure to do so would be the failure of the company, but if the decedent knew that it was his duty to display the signals, and he neglected to do so, and by reason of such failure he was injured and killed, the company would not be liable.

NEGLIGENCE.—*Contributory.—Complaint.—Specific Averment.*—A general averment in the complaint that the injured party was himself free from fault or negligence is sufficient, unless it is overcome by the specific averment of other facts, showing notwithstanding the general averment that he was guilty of contributory negligence.

From the Dubois Circuit Court.

J. E. Iglehart, *E. Taylor* and *J. L. Bretz*, for appellant.

C. L. Jewett, *J. F. Tieman* and *H. C. Jewett*, for appellee.

McBride, J.—This is an appeal from a judgment recovered by the appellee for the alleged negligent killing of her decedent, Henry A. Hanning, who was a car repairer, employed by the appellant in its repair shops at Huntingburg.

The appellant insists that the court erred in overruling a demurrer to the paragraph of complaint on which the case was tried.

Omitting prefatory averments, the complaint avers that, "In repairing defendant's cars, it was necessary for the person employed to do the same to work on top of, and around, and under said cars, and that to enable said employees, including plaintiff's intestate, to properly and safely perform their labor and duties, the defendant had established certain railroad tracks to be used as repair tracks, and commonly called shop tracks, over which tracks trains of cars were not run or switched. And plaintiff avers that when cars to be repaired were placed upon said tracks, the repairs could be made with safety to those engaged in making the same. The plaintiff avers that near said repair tracks, were certain other railroad tracks of the defendant, to wit, sidetracks, used for the running and switching of trains, and that it was dangerous and hazardous to attempt to repair cars while they were standing upon such side-tracks, without having certain signal flags so placed as to warn those engaged in running and switching trains not to run cars or locomotives over said side-tracks when cars were being repaired. But, when such signal flags were properly placed and displayed, cars could be repaired upon said side-tracks without danger. The plaintiff avers that in his said service and employment with the defendant, plaintiff's intestate undertook to work at repairing cars, when the same were placed upon said shop tracks, but did not agree, or undertake to repair cars when standing upon such side-tracks, or to subject himself to the dangers and hazards of so doing.

"The plaintiff further avers, that, on the 26th day of

August, 1889, while the plaintiff's intestate, Henry A. Hanning, was in the service and employment of defendant as aforesaid, he was directed and required, by one M. Contant, the defendant's general foreman, to whose orders said Henry Hanning was then and there subject, to go to one of the side-tracks aforesaid, called side-track No. 1, and to there repair a certain flat-car then standing thereon; and, in obedience to said order, said Henry A. Hanning went to said side-track and proceeded to repair said car; that the nature of said repairs required the said Henry A. Hanning to go beneath one end of said car, and remain at work in a stooping position behind the trucks, with his back to the same, where he could not see or discover the approach of locomotives or cars upon said side-track. The plaintiff avers that it was the duty of defendant, and of said Contant, as said general foreman, to cause signal flags to be placed, to warn trainmen not to run cars or locomotives upon said side-track No. 1, while said Henry A. Hanning was at work under said flat car, and that he, Hanning, worked under said car, believing that defendant and said Contant had performed their duty in that regard, and placed said flags; but the plaintiff says that the defendant and said Contant negligently failed to place, or cause to be placed, any signal flag to prevent cars or locomotives from running upon said side-track; that while said Henry A. Hanning, in performance of his duty, was so at work under said flat car, and behind the trucks, and without any notice or warning to him whatever, and without his knowledge, the defendant caused a locomotive and train of cars to be run into, upon and over said side-track, and against said flat car, with great force and violence, whereby said car, and the trucks thereof, were run against and over said Henry A. Hanning, and he was crushed, injured and killed. The plaintiff avers that the injuries and death of said Henry A. Hanning were occasioned solely by the negligence of the defendant in failing to have any signal flag placed or displayed to prevent cars and locomotives from

running on and over said side-track No. 1, and without any fault or negligence of said Henry A. Hanning," etc.

Counsel for the appellant, as we understand their contention, insist, in substance, that the legitimate inferences that must be drawn from the specific statement of the acts of the decedent overcome the general averment that he was without fault or negligence, and show that, notwithstanding, he was guilty of contributory negligence; that being directed to work in an unusual place, where he would be exposed to greater dangers, of which he had knowledge, he had no right to rely upon the presumption that others had done their duty, but that it was his duty to personally investigate and ascertain if the proper signals were in fact displayed, and the place in which he was directed to work thereby made safe.

No authority need be cited in support of the firmly settled rule requiring the master to use at least ordinary care to furnish to his employes a reasonably safe place to work. The term "safe place to work," as thus used, is, of course, necessarily relative. It does not mean a place absolutely free from danger, as some vocations from their very nature involve the constant encountering of danger.

The rule is equally well settled that a servant impliedly assumes all of the ordinary and usual risks incident to his service, so far as they are known to him, or so far as one of his age and experience ought, in the exercise of ordinary care, to be able to discern them, even where the duties of the service are necessarily hazardous. *Brazil Block Coal Co.* v. *Hoodlet*, 129 Ind. 327, and authorities there cited.

If, however, the master requires of him a service outside of the duties ordinarily incident to his employment, and subjecting him to additional danger, he does not necessarily assume the additional hazard in undertaking to perform the unusual and extra service, even although the dangers attending it are obvious.

If the apparent danger is such that a person of ordinary

prudence, exercising that prudence, would refuse to encounter it, the employee proceeds at his peril. Otherwise, he may undertake the service, using care proportioned to the apparent increased risk, and if, in so doing, he is injured by the employer's fault, he may recover for the injury. *Brazil Block Coal Co.* v. *Hoodlet, supra.*

Here a service was required of the decedent outside of the line of his employment, and at a place other than that provided for the performance of his regular and ordinary duties. The averments of the complaint show that he was required to perform this service, in the particular place indicated, by the direction " of his superior, to whose orders he was subject. Its performance would subject him to great danger, unless certain precautions were observed in the placing of signal flags. These dangers grew out of the place in which he was required to work, and were, it is averred, unknown to his regular employment. It is also averred that these dangers could be entirely obviated by the placing of the flags. With the flags properly placed it was a safe place in which to work.

The act of assigning to the decedent the new place to work was the act of the master, no matter who acted as his representative in so doing. The master's duty required the exercise of at least ordinary care to make and keep the place safe while the work was being done, which, as above stated, could have been done by properly placing the signal flags referred to. While Hanning was not absolved from the duty of using his judgment and his senses for his own protection, he was justified in assuming that the master would be mindful of his duty, and would not wantonly expose him to peril. If it were shown that Hanning knew that no signal flags were displayed, and that no precautions had been taken for his safety, a very different question would be presented. But it is averred that he believed that the proper precautions had been observed. So far as the aver-

ments of the complaint are concerned, it can not be said that this belief was not justified.

Rules well settled by repeated decisions of this and other courts sustain the sufficiency of this complaint.

In the case of *Taylor* v. *Evansville, etc., R. R. Co.*, 121 Ind. 130, this court said: "It is important to bear in mind that the appellant was performing a special duty enjoined upon him by a superior whom it was his duty to obey. Although the work was within the scope of his service, nevertheless he was performing it under a special order. It was, therefore, a wrong on the part of the agent having the right to order him to do the specific work to increase the peril of the service by his own negligence. The employee, acting under the specific order, had a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe.

In the case of *Harrison* v. *Detroit, etc., R. R. Co.*, 79 Mich. 409 (19 Am. St. Rep. 180) (190), the court says: "It is a general rule that if a master directs the servant to do some act which is even dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and, failing to exercise such care, the master is held liable."

In *Brazil Block Coal Co.* v. *Young*, 117 Ind. 520, the court says: "It is established law that an employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work. * * * This is a duty which rests upon the employer, and which he can not delegate. No matter by whom the duty is performed, the employer is responsible if it is negligently performed and from that negligence injury results. The employer can not escape liability by delegating it to an agent. * * * The duty of the employer to use ordinary care and skill to make the working place he provides for his employees reasonably safe, exists, no matter how dangerous may be the service. He does not warrant the safety of the working place, but he does undertake

that he will use reasonable skill and care to make it as safe as the nature of the service will admit. He must do what ordinary care and diligence can do to make the place reasonably safe."

In *Cincinnati, etc., R. W. Co.* v. *Lang*, 118 Ind. 579, it is said: "The duty of providing for the safety of employees rests on the employer, and can not be delegated. In this instance the duty of exercising reasonable care to prevent injury to the intestate while going to the place where he was ordered, and providing for his security, rested upon the appellant. It was, therefore, the duty of the master that was neglected, and it was this neglect of duty, and not that of a fellow-servant, which caused Jacob Lang to lose his life."

In *Pennsylvania Co.* v. *O'Shaughnessy*, 122 Ind. 588 it is said: "An employee who does what he is ordered to do is not in fault, but is protected, to a reasonable extent, by the order while engaged in performing the special duty enjoined upon him."

In *Cincinnati, etc., R. W. Co.* v. *Roesch*, 126 Ind. 445, it is said by MITCHELL, J.: "An employee has the right to repose confidence in the prudence and caution of his employer, and rely upon the safety and suitableness of implements or appliances with or about which he is required to work, and, that the place assigned him to work is safe from any hidden or undisclosed perils which are not open and obvious to his senses." See, also, *Louisville, etc., R. W. Co.* v. *Graham*, 124 Ind. 89; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind. 212; *Krueger* v. *Louisville, etc., R. W. Co.*, 111 Ind. 51. Indeed, this list of citations might be extended indefinitely.

It is also settled as the law in this State, in cases of this character, that a general averment in the complaint that the injured party was himself free from fault or negligence is sufficient, unless it is overcome by the specific averment of other facts, showing, notwithstanding, that he was guilty of contributory negligence. *Stewart* v. *Pennsylvania Co.*, 130

Ind. 242; *City of Wabash* v. *Carver*, 129 Ind. 552, and cases cited in both.

In our opinion the objections urged against the complaint are not tenable. It states a good cause of action.

The only other proposition argued by counsel for the appellant is, that the court erred in giving to the jury the following instruction:

"In determining whether the company was negligent in not displaying a signal flag at the head of switch track No. 1 (if in fact no such signal was so placed), or whether the decedent, Hanning, was negligent in going under the cars without himself placing the signal at the head of the switch track on which the car stood that was to be repaired, it is important that the jury should observe the rules of law. If Contant was the foreman under whom Hanning worked, and to whose orders he was subject, and as such foreman, ordered Hanning to repair the car on the track where it stood, in the absence of any rules on the subject of signals, or previous direction to Hanning on that subject, it would have been the duty of the foreman, in behalf of the company, to see that the place where Hanning was to work was made reasonably safe. And if the place could have been made safe by placing a signal flag at the head of the switch track, it would have been the duty of the foreman to have the signal flag so displayed; and a failure on the part of the foreman to discharge that duty would have been the failure of the company. But, on the other hand, if at the time Hanning was directed to make repairs on the side of the car (and any other needed repairs if so directed), he knew that it was his duty, and one of the rules of the company required that if he went under the car he must himself place a signal flag at the head of the switch track, and so knowing the rule, and his duty in that respect, neglected to display a signal flag, but went under the car without first complying with that duty, and by reason of his failure to so display a signal flag he was injured and killed, in that view of the

case the decedent was not without fault as charged in the complaint, and the plaintiff can not recover."

This instruction correctly states the law, and the court did not err in giving it. The reasons which impel us to this conclusion sufficiently appear in what we have said regarding the sufficiency of the complaint, and require no further elaboration.

Judgment affirmed, with costs.

COFFEY, J., dissents.

Filed May 10, 1892.

No. 15,804.

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TAYLOR v. HEARN ET AL.

PLEADING.—*Defects Cured.*—In an action on a note and for the foreclosure of a mortgage, facts which are not averred in the pleading, but which appear in copies of the note and mortgage therein set out, cure the deficiency of the paragraph.

SAME.—*Complaint.*—*Sufficiency of Demurrer.*—A complaint which states an immaterial fact is not bad on demurrer if it also states a cause of action for some relief.

MARRIED WOMAN.—*Estoppel.*—*Suretyship.*—*Representations.*—When a married woman represents that a loan, which is secured by mortgage on her lands, is for her own use, she will be estopped, as against one who in good faith has contracted with her in reliance upon her statements, from asserting that she is a surety, and not the principal in the transaction.

From the Jay Circuit Court.

D. T. Taylor, *J. W. Headington* and *J. F. LaFollette*, for appellant.

C. Corwin, *J. M. Smith* and *S. W. Haynes*, for appellees.

MILLER, J.—This suit was brought by the appellee against the appellant, and her husband, who does not join in the appeal, on a note executed by both defendants, and for the fore-

closure of a mortgage on the separate property of the appellant.

A number of errors are assigned in this court, which we will consider in their order.

It is claimed that the first paragraph of the complaint was bad, and that the court erred in overruling the demurrer filed to it.

The objections pointed out to this paragraph are, as stated in the brief of counsel:

1st. "That it contains no allegation as to who the mortgagee was."

2d. "That the paragraph does not contain a description of the lands mortgaged."

3d. "That it is not averred that the mortgage is due and unpaid; nor that the mortgage was executed to secure the payment of the note."

Copies of the note and mortgage were filed with each paragraph of the complaint, and from their recitals we know that the mortgage was executed to secure the note which was given to the appellee. A full description of the real estate is set out in the mortgage. It is alleged that the note was due and unpaid.

These allegations and recitals dispose of all the objections to this paragraph. The pleading would be good on demurrer if each of the objections were well taken, for the plaintiff would still be entitled to a personal judgment on the note.

A demurrer was overruled to the second paragraph of the complaint, and this ruling is assigned as error.

This paragraph counts upon, and exhibits, the same note and mortgage mentioned in the first paragraph, and in addition to the usual averments, says: "That before the maturity of said note the plaintiff indorsed said note for a valuable consideration, to one Harvey P. Swarner; that afterwards the said Swarner brought suit against this plaintiff on the indorsement on said note, but before the same went into judgment said plaintiff took up said note and paid to said

Swarner thereon the face and interest thereof, and in addition thereto was compelled to, and did, pay twenty dollars as attorney fees, and thirty dollars costs, which attorney fees, costs, note and interest have not been paid to this plaintiff by defendant."

It is argued that this paragraph shows that the note had been assigned by the appellee to Swarner, and fails to show that it had been re-assigned to the plaintiff before the bringing of the action.

The language used in the pleading that, after suit upon his indorsement, but before judgment, the "plaintiff took up said note and paid to Swarner the face and interest thereof," is susceptible of but one meaning, and that is that the note was re-assigned to the payee. In addition to this, the possession of the note by the plaintiff imports ownership on his part. *Mendenhall* v. *Banks*, 16 Ind. 284; *Williams* v. *Dyer*, 5 Blackf. 160; *Paulman* v. *Claycomb*, 75 Ind. 64.

It is also argued that the appellant was not liable for the amount paid by the appellee for attorney's fees and costs incurred in the suit by Swarner against the appellee. This is probably true, but that would not make the complaint bad on demurrer. If this paragraph stated a cause of action for some relief, the demurrer was correctly overruled. *Bayless* v. *Glenn*, 72 Ind. 5.

We are of the opinion that a fair construction of the allegations of this paragraph shows that it charges that the note was *due*, but it is not important that it should so state, for the copy of the note filed as an exhibit shows that it had long been overdue. *Green* v. *Louthain*, 49 Ind. 139; *Hardin* v. *Helton*, 50 Ind. 319; *West* v. *Hayes*, 104 Ind. 251.

The appellant filed a counter-claim against the appellee and her husband in which she averred that she was the owner of the land described in the mortgage in her own right, and that she signed the note and mortgage as the surety of her husband, who received the consideration for which they

were executed, and asked that they be cancelled and the title of the land quieted.

To this the appellee answered, that in September, 1887, the defendant, John W. Taylor, came to his restaurant in the city of Portland, and stated that his wife was the owner of a large amount of real and personal property which she was desirous of trading for such restaurant; that he, John W., was her agent; that afterward the appellee and another called upon her at her residence on her farm and stated to her that they had come, at the solicitation of her husband, to negotiate a trade of the restaurant for her property; that they then and there stated to her that they were not trading with her husband, and would not trade with him; that she told them that she owned the stock on the farm, and that she desired to trade it for the restaurant, and go into the restaurant business, for her own use, separate business and benefit; that after looking at the stock on the farm they returned to her, and stated the terms upon which they were willing to make the trade, which included the execution by her, to the appellee, of the note and mortgage in suit; that she stated that she was willing to make the exchange, and agreed that the trade might be consummated with her husband, as her agent, and then and there made and signed the following affidavit:

"I, Turressa B. Taylor, being a married woman, and having bought of Christopher Hearn certain merchandise, and executing to the said Hearn a mortgage on the east half of the northeast quarter of section 8, town. 23, range 13 east, to secure the sum of seven hundred dollars, due in one year from this date, being sworn according to law, on my oath depose and say, that this mortgage is given to be used by me exclusively, and not for the use of my said husband, nor any other person, either directly or indirectly; nor is the said debt proposed to be secured money, nor the mortgage proposed to be executed by me to secure the same, to be payment or security of the debt of my said husband, nor any other person,

but the money is to be used to buy a restaurant for my own individual use and benefit. This Sept. 12th, 1887.

"TURRESSA B. TAYLOR.

"Subscribed and sworn to before me this Sept. 12th, 1887.

"CHAS. W. McLAUGHLIN,

"Notary Public."

That by her representations, which the plaintiff believed to be true, he was induced to exchange his said restaurant to the said Turressa, as he then understood the contract, which he would not have done had it not been for the same; that after the exchange of the property and execution of the note and mortgage, said Turressa entered into the possession of the restaurant and continued to operate the same, in her own name, and as her own separate property, for a period of about one year, and so long as she remained in the same.

The appellant demurred to this paragraph, her demurrer was overruled, and this ruling is assigned as error.

We are satisfied that the facts stated in this paragraph of answer to the counter-claim are sufficient to estop the appellant from asserting, as a defence to the collection of the note and mortgage, that she was the surety of her husband, and not the principal in the note.

It is well settled that where a married woman represents that a loan, which is secured by mortgage on her lands, is for her own use, she will be estopped, as against one who in good faith has contracted with her in reliance upon her statements, from asserting that she is a surety, and not the principal in the transaction. *Ward* v. *Berkshire, etc., Ins. Co.*, 108 Ind. 301; *Rogers* v. *Union, etc., Ins. Co.*, 111 Ind. 343; *Lane* v. *Schlemmer*, 114 Ind. 296; *Bouvey* v. *McNeal*, 126 Ind. 541; *Cummings* v. *Martin*, 128 Ind. 20.

We have considered the argument of appellant, that the pleading shows that the appellee was not misled by the statements and affidavit of the appellant, but are of the opinion that we can not, in construing this pleading, disregard the plain averments in the answer, that he believed her

statements and representations to be true, and was then and thereby induced to enter into the contract, which he would not have done had it not been for the same.

The statements made by the appellant that she was the principal in the transaction, and was trading for the restaurant for her own individual use, could not well have been in stronger terms than those contained in her affidavit. She certainly is not in a position to say that her sworn statements were untrue, and that the appellee should not have believed them.

The statute forbidding married women from becoming sureties was enacted for their protection, but not to permit them to perpetrate fraud.

The second and third paragraphs of answer to the counter-claim of the appellant are in substance the same. They admit that at the time she signed the note and mortgage she was a married woman, but aver that the consideration of the note was the barter and exchange of a restaurant and bakery, traded to and delivered to her, as her own separate and individual property, for her own use and separate business.

These answers amount to little more than special denials of the counter-claim. They do, however, state facts which, if true, show that the appellant was the principal in the transaction, having bartered for the property, in part payment for which the note and mortgage in suit were executed. If she received the consideration for which the note was executed, she was the principal, and not a surety for her husband. *Vogel* v. *Leichner*, 102 Ind. 55; *Bouvey* v. *McNeal*, *supra*; *Crisman* v. *Leonard*, 126 Ind. 202; *Johnson* v. *Jouchert*, 124 Ind. 105.

The court did not err in overruling the appellant's demurrer to either of these answers.

The sixth and seventh errors assigned relate to the action of the court in overruling the demurrers to the first and second paragraphs of appellee's reply to appellant's answer.

We have examined these pleadings, and find that they are,

in substance, repetitions of pleadings filed in making up the issues on the counter-claim of the appellant, and present no question not considered and passed upon in this opinion.

We find no error in the record.

Judgment affirmed.

Filed May 12, 1892.

131	543
138	263
139	351
131	543
148	237

No. 15,083.

Hartlepp et al. v. Whitely, Fasler and Kelly Company et al.

Fraudulent Conveyance.—*Special Finding.—Silence of as to Other Property.*—Where, in a suit to set aside an alleged fraudulent conveyance of land, the special finding of facts failed to disclose that the grantor had no property other than the said land out of which the debt sued for might be made either at the time of the conveyance or from that time to the time suit was brought, a judgment setting aside the conveyance was erroneous. The finding being silent upon these material facts, it stands as if such facts were not proven.

Special Finding.—*Can not be Amended After Judgment.*—A special finding can not be amended and defects in the same supplied on motion of one of the parties to a suit after the rendition of the judgment.

From the Tippecanoe Circuit Court.

I. E. Schoonover, for appellants.

J. McCabe and *E. F. McCabe*, for appellees.

Olds, J.—The complaint by the appellees, in this action, was to set aside a conveyance of the real estate described therein, alleged to have been fraudulently made to appellants by one Kasper Hartlepp, who was a co-defendant in the court below.

The cause was tried by the court without a jury, and the court, at the request of the appellants, made a special finding of facts, and stated conclusions of law thereon.

The appellant excepted to the conclusions of law as stated by the court. The appellants also moved the court for a judgment in their favor on the special finding of facts, which was overruled, exceptions reserved by appellants and judgment rendered for the appellees.

There was an entire omission to find any facts showing that Kasper Hartlepp, the appellants' grantor, had no property other than the land out of which the debt sued for might have been made, either at the time of the conveyance or from that time up to the time suit was brought. For aught that appears from the finding, the grantor may have had an abundance of other property out of which the debt might have been made at the time of the conveyance, and from thenceforward up to and at the time suit was brought. The finding of facts was fatally defective, and the court erred in its conclusions of law; also, in overruling appellants' motion for judgment on the finding. The finding being silent upon these material facts, it stands as if such facts were not proven, and upon failure to prove such facts, appellant was entitled to a judgment. *Brumbaugh* v. *Richcreek*, 127 Ind. 240, and authorities there cited.

The court sought to remedy the defect in the finding. Some days after the rendition of the judgment the appellees, the plaintiffs below, appeared in court and moved the court to amend the special finding "by finding whether or not said defendant Kasper Hartlepp had any property subject to execution other than the lands described in the complaint from the time of said conveyances to the time of beginning of this action." The court sustained the motion and made a finding that Hartlepp had no property other than the land subject to execution at the time of the conveyance, nor at any time thereafter up to the commencement of this action, and stated that such finding was made from the evidence, and ordered that it be entered of the day of the trial, and that it should have the same effect as if made at the day of the trial along with the other findings. This latter action of the court

was clearly of no effect. The court can not amend and supply defects in a special finding on motion of one of the parties to a suit after the rendition of the judgment, even if it could do so before judgment. In the case of *Clark* v. *State, ex rel.*, 125 Ind. 1, this court held that the court had no power to alter or change its special findings after it had been returned and entered of record, and the same doctrine has been held in previous decisions of this court. *Wray* v. *Hill*, 85 Ind. 546; *Levy* v. *Chittenden*, 120 Ind. 37.

In the opinion of the court justice will be best subserved by the granting of a new trial.

Judgment reversed at costs of appellees, with instructions to the court below to set aside the judgment and grant a new trial.

Filed Oct. 7, 1891.

SUPPLEMENTAL OPINION.

OLDS, J.—In the original opinion we only made a statement showing the controverted question presented for decision, and it should have been more explicit. The appellees, Whitely, Fasler & Kelly, and James McCabe, joined in the action as plaintiffs, alleging and showing that Whitely, Fasler & Kelly had a judgment against Kasper Hartlepp which was unsatisfied, and that McCabe held a note executed by said Kasper Hartlepp to him for $145, due September 1st, 1885, with eight per cent. interest, and attorney fees, and alleging facts showing a fraudulent conveyance and transfer by Kasper Hartlepp of his real estate, and asking judgment in favor of McCabe on his note, and to have the fraudulent conveyance set aside and the land subjected to the payment of the Whitely, Fasler & Kelly judgment and the judgment of McCabe.

The facts found show McCabe entitled to his judgment, and judgment was rendered in his favor. The personal judgment in favor of McCabe was authorized by the find-

ings of fact and should not be set aside, but the judgment setting aside the conveyance by Kasper Hartlepp to James Hartlepp should be set aside.

The mandate of the original opinion is, therefore, hereby modified, and the personal judgment in favor of James McCabe is affirmed, and the judgment setting aside the conveyance is reversed, at costs of appellees, and the court ordered to grant a new trial.

Filed May 12, 1892.

No. 15,574.

HOLLINGSWORTH v. STUMPH.

REAL ESTATE.—*Judgment for Possession of and for Damages.—Occupying Claimant.—Injunction.—Merger of Judgments.*—Proceedings under the occupying claimants' act are entirely independent of the principal action for the recovery of the land, except that they have the effect to stay the issuance of the writ of possession until the rights of the occupying claimant are determined and adjusted. After the occupying claimant's rights have been determined, the other party may pay the amount due him as such occupying claimant, and issue a writ for possession, and also an execution for the collection of his judgment, for the amount in each judgment is fixed independently of the other.

From the Montgomery Circuit Court.

J. Wright and *J. M. Seller*, for appellant.

G. D. Hurley and *M. E. Clodfelter*, for appellee.

McBRIDE, J.—The appellee recovered a judgment against the appellant for the possession of certain land and for $175 damages. On the day this judgment was recovered the appellant filed his complaint as an occupying claimant of the land, who in good faith, and under color of title, had made lasting and valuable improvements on it.

Issue was joined on this complaint, and a trial had at a

subsequent term, resulting in a judgment, fixing the amount to be paid by the appellee for the use of the appellant, and, in case he failed to pay, fixing the amount the appellant might then pay if he elected to hold the land. The value of the appellant's interest in the land was fixed at $375, which amount the appellee paid, and then ordered an execution for the collection of the judgment for $175. This suit was brought to enjoin the collection of that judgment.

The court below sustained a demurrer to the complaint, and this ruling is assigned as error. Proceedings under the occupying claimant's act are entirely independent of the principal action for the recovery of the land, except that they have the effect to stay the issuance of a writ of possession until the rights of the occupying claimant are determined and adjusted. If, after his rights are ascertained and fixed by judgment of the court, the other party elects to pay the amount found to be due him, as such occupying claimant, and does so, he is then entitled to a writ for the possession of the land. Section 1083, R. S. 1881. We can see no reason why he is not, also, and at the same time, entitled to execution for the collection of his judgment.

The statute makes no provision for taking it into account in ascertaining the amount due to the occupying claimant. While the matters to be considered in ascertaining the sum due him, and the respective amounts which each party may be required to pay are specified with much particularity, there is no mention of or reference to the judgment that may have been recovered for damages in the principal action.

The appellant's contention that it is merged in the judgment recovered by the occupying claimant, we think, is not sustained by a fair construction of the statute.

The circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed March 12, 1892; petition for a rehearing overruled May 12, 1892.

No. 15,371.

131 548
149 315

Ross v. The State, ex rel. Perkins, Trustee.

PLEADING.—*Amended Complaint.—Answer.—Statute of Limitations.*—Where an original complaint is amended so as not to change the cause of action, an answer setting up the statute of limitations as to the amended complaint is not good unless such answer would have been available as to the original complaint.

TOWNSHIP TRUSTEE.—*Officer of Civil and School Townships.—Liable in Same Action for Both Funds.*—A township trustee is an officer of both the civil and school township, and he gives but one bond for both, and is liable in the same action for funds due both, and can not be required to set out the funds of each in separate paragraphs.

SAME.—*Conversion of Funds by.—Evidence.*—Where a township trustee, who is sued for money converted by him, offers to testify in his own behalf that he paid out a certain sum of money borrowed for the township, with which he failed to charge himself in payment of certain orders issued and outstanding at the time he entered upon his duties as trustee, such proffered testimony was properly excluded, there being no preliminary proof making such testimony proper, if admissible at all; for the law requires a trustee to make report of his proceedings accompanied with proper vouchers, and make settlements with the board of commissioners, and also to make a record of the same.

From the White Circuit Court.

J. R. Coffroth and *W. R. Coffroth*, for appellant.

R. P. Davidson, for appellee.

OLDS, J.—This action was brought by the appellee against the appellant for alleged malfeasance in office for moneys received and converted by the appellant, while trustee of York township, in Benton county, to his own use, and not paid over or accounted for at the end of his terms of office. The action was originally commenced in the Benton Circuit Court, the venue changed to the Tippecanoe Circuit Court, and from there to White Circuit Court. The appellant was made a sole defendant, and the action in the first instance was against him personally, and not based upon the bond. Afterwards a demurrer was sustained to the original paragraphs of complaint and amended, and additional para-

graphs of complaint were filed declaring upon the bond. The action, as first instituted, was for the same deficiency, and to recover for the same defalcations and conversions of money, based upon the same breaches of duty, and contained such averments as would have been necessary to a recovery upon the bond, but no copy of the bond was set out, and it was not a declaration upon the bond.

After the filing of the amended and additional paragraphs of complaint, based upon and setting out a copy of the bond, the appellant pleaded in answer the five years' statute of limitations, alleging that the causes of actions stated in each of the paragraphs of the complaint did not, nor did either of them, accrue within five years from the date of the filing of such amended and additional paragraphs. The court sustained a demurrer to the paragraphs of answer which pleaded the five years' statute of limitations, or what was the same in effect. The Tippecanoe Circuit Court overruled a demurrer to these paragraphs of answer, and afterwards the White Circuit Court carried back a demurrer to the reply to the paragraphs, and sustained it to each of such paragraphs of answer. The question presented is as to whether or not the action is barred in five years from the time of the filing of the amended paragraphs of complaint based upon the bond.

We think there is no doubt as to the correctness of the ruling of the trial court in sustaining the demurrers to these paragraphs of answer.

The causes of action upon which both the original and amended paragraphs of complaint were based were the same. The object of the suit was to recover the money converted and used by the trustee. The original complaint was filed for that purpose. The amended paragraphs of complaint were for the same purpose. The change in the complaint was to add a copy of the bond, and make formal allegations declaring upon it. The fact that some additional advantages might be gained in the remedy by a recovery upon the bond

does not change the cause of action. There is but little, if any, difference in this respect in the case at bar and a case for the recovery of money on contract, when in the original complaint there were no allegations that the contract was in writing, but averments as to its terms, and afterwards an amendment is made to the complaint, alleging that the contract is in writing, and setting out a copy thereof. Certainly, in such a case it could not be seriously contended that there was a change or substitution of a new cause of action by the amendment, even though the contract contained a provision waiving valuation and appraisement laws.

This action was instituted to recover the money due the township from a defaulting trustee. The action continued to be an action of the same character and for the same purpose and for the same defalcation, although the paragraphs of complaint were amended, and new ones filed setting out a copy, and formally declaring upon the bond given by him. There were no new parties brought into court. The action continued against the appellant alone. It was the violation of duty, the wrong committed by the appellant while trustee, which gave the right of action. It was this wrong and violation of duty upon which both the original and amended paragraphs of complaint were based.

In the case of *Flournoy* v. *City of Jeffersonville*, 17 Ind. 169, it is held that the bringing of an action, though erroneous in form under a statute giving a right of action, will save the claim from being barred by the statute of limitations.

If the action was commenced before the cause of action was barred by limitation, the appellee was entitled to recover, notwithstanding the amendments afterwards made to the complaint.

The paragraphs of answer alleging that the cause of action accrued five years prior to the filing of the amended complaint were bad, and the demurrer thereto was properly sustained.

The appellant assigns as error the overruling of a motion

to require the appellee to place in different paragraphs the funds of the civil and school townships.

We think there was no error in this ruling. As trustee the relator represented both townships, and could in the same action recover the funds due both. He recovers the funds of both as trustee, and holds the same in trust for the township to which it belongs. The suit is upon the same bond for both funds. The same person by an election and qualification becomes trustee of both the civil and school townships, and he gives but the one bond. A recovery for all defalcations can be had in one action. *Strong* v. *State, ex rel.*, 75 Ind. 440.

There is a further question presented as to the ruling of the court in excluding certain evidence, it being offered to prove by the appellant testifying as a witness in his own behalf that he paid out a certain one thousand dollars borrowed for the township with which he failed to charge himself, in payment of certain orders issued and outstanding at the time he entered upon his duties as trustee. The law requires the trustee to make report of his proceedings, accompanied with proper vouchers, and make settlements with the board of commissioners. He is also required to make a a record of the same. There was no such preliminary proof offered as to make the testimony proper, even if it was proper in any event under the state of the issues.

There is no available error in the record.

Judgment affirmed, with costs.

Filed March 17, 1892; petition for a rehearing overruled May 12, 1892.

131 552
143 97
131 552
150 268

No. 15,422.

Scobey v. Kinningham.

Mortgage.—*Foreclosure of.—Redemption by Subsequent Mortgagee.—Enforcement of Lien —Estoppel.—Complaint.*—A mortgagee from a husband who redeems the land from a sale on foreclosure of a prior mortgage executed by the husband and wife, has a lien which he may enforce, and in a suit to enforce such lien, the wife can not successfully assert that the redemption was not an effective one, the holder of the certificate having assented thereto, and having accepted the redemption money. It is immaterial that the complaint failed to allege title to the land in the husband, the facts pleaded showing that he had title thereto.

Same.—*Capacity in which Redemption is Made.—Estoppel.*—The acceptance of the redemption money by the holder of the sheriff's certificate estops him, but it does not estop the wife from availing herself of such rights as the statute confers upon her. She is not estopped from questioning the capacity in which the appellant acted in redeeming the land, and in asserting that he was the owner of the land, and that he redeemed it in that capacity.

Same.—*Absolute Deed As Mortgage.*—The plaintiff is not estopped from asserting that he was not the owner of the land, but a mortgagee, although his deed was absolute on its face, and was recorded among the conveyances.

Same.—*Mortgagor's Title.—Estoppel.*—A mortgagor is estopped to aver, as against his mortgagee, that he had no title to the land mortgaged.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

F. E. Gavin and *J. D. Miller*, for appellee.

Elliott, C. J.—The appellant alleges, in his complaint, that on the 10th day of September, 1888, James Hart obtained a decree of foreclosure against the appellee upon a mortgage executed by her and her husband upon eighty acres of land; that a certified copy of the decree was issued to the sheriff, a sale of the land made by him to Orion K. Thomson for six hundred and fifty-six dollars, and a certificate issued to the purchaser on the 13th day of October, 1888; that the purchaser assigned the certificate to Frank Thomson, who paid taxes due on the land to the amount of

thirty-one dollars and fifty-four cents; that Benjamin Kinningham, on the 10th day of December, 1888, executed a deed for the land to the appellant; that the instrument executed to the appellant, although absolute on its face, was, in fact, a mortgage executed to secure the sum of five hundred dollars; that the instrument was duly recorded on the 4th day of May, 1889; that on the 8th day of October, 1889, the appellant filed an affidavit of these facts, with a copy of the instrument executed to him by Kinningham, "in due form of law," to redeem the land from the sheriff's sale, and then paid to the clerk the sum of seven hundred and forty-one dollars, and sixty-six cents in full of the purchase-money, with eight per cent. interest and the taxes paid by Thomson; that the money was accepted by the clerk in redemption of said land; that Thomson, the holder of the sheriff's certificate, made no objection to the redemption by the appellant, but, on the contrary, received the money paid to the clerk; that at the time of paying the money the appellant claimed to redeem the land as a mortgagee; that the appellant's debt is due and unpaid, as is the sum paid by the appellant to redeem the land. The relief sought is a foreclosure of the lien claimed under the redemption made by the appellant.

We think it quite clear that Mrs. Kinningham can not successfully assert that the redemption by the appellant was not an effective one. If the holder of the certificate was satisfied to accept the money paid to redeem the land, the debtor can not object that there was no redemption. The question whether there was or was not a valid redemption was settled by the redemptioner and the holder of the sheriff's certificate. *Hervey* v. *Krost,* 116 Ind. 268.

Whether Scobey's interest or estate in the land be regarded as that of a mortgagee or as that of an owner, it is evident that he had a right to redeem; hence he was not a mere volunteer. As he was not a volunteer and paid money to discharge an obligation for which he was not primarily liable, he is entitled to a lien upon the land. The principle

which undergirds the great doctrine of subrogation applies to this particular phase of the case, but not with full force and vigor, inasmuch as the right which the appellant asserts is created solely by statute and not by the courts of equity. But while the principle which underlies the great doctrine of subrogation can not have full and unfettered application, it does, nevertheless, in some measure, supplement the statute, and thus indirectly sustains the claim of the appellant to an interest or estate in the land. *Boos* v. *Morgan*, 130 Ind. 305; *Shattuck* v. *Cox*, 128 Ind. 293; *Huffmond* v. *Bence*, 128 Ind. 131; *Paxton* v. *Sterne*, 127 Ind. 289, and cases cited.

While it is true that the position of the appellant is, to a limited extent, supported by the equitable principle to which we have referred, it is equally true that the principle stated is far from supporting the broad claim he asserts. The principle can not be extended to cover the case in all its aspects, for the plain reason that the sale cut off the purely equitable right to redeem, and left only the right conferred by the statute providing for the redemption of lands sold on execution. The appellant's right being statutory, he can obtain only what the statute grants. As the right is statutory, it is to be enforced as the statute provides and not otherwise. *Robertson* v. *Van Cleave*, 129 Ind. 217; *Horn* v. *Indianapolis Nat'l Bank*, 125 Ind. 381, and cases cited; *Hervey* v. *Krost*, *supra*; *Ex parte Bank of Monroe*, 7 Hill, 177; *Littler* v. *People ex rel.*, 43 Ill. 188; *Durley* v. *Davis*, 69 Ill. 133. The right which the appellant exercised when he redeemed the land was entirely different in its nature and origin from that created by courts of equity. Between the statutory right and the equity right there is a wide and important difference. The one right, that given by the statute, does not come into existence until after the judgment and sale, while the other right, that created by equity, ceases with the decree which declares the right to redeem to be barred. *Eiceman* v. *Finch*, 79 Ind. 511. After the sale the appellant and his grantor had a right

to redeem by complying with the statute, but neither had any other or greater right.

The acceptance of the redemption money by the holder of the sheriff's certificate did not estop the appellee from insisting upon her right to have the law obeyed by the appellant in enforcing his lien. An acceptance of the redemption money by the holder of the sheriff's certificate estops him, but it does not estop the judgment debtor from availing himself of such rights as the statute confers upon him. *Goddard* v. *Renner*, 57 Ind. 532. Nor did the transaction between those parties estop the appellee from questioning the capacity in which the appellant acted in redeeming the land. It is not possible for two persons by a transaction between themselves to create an estoppel against a third person who was neither a party to the transaction nor in privity with either of the parties.

The controlling question in this case is as to the capacity in which the appellant redeemed the land. It can not be doubted that he had a right to redeem either as mortgagee or as owner, since he either has an estate in the land under an absolute deed, or an interest in it as an encumbrancer by virtue of the mortgage executed to him by Benjamin Kinningham. We regard as untenable the position of the appellee that, as the deed to the appellant was not recorded in the mortgage record, he has no title of record such as will enable him to redeem. Two reasons support our conclusion: *First.* As the instrument was a deed in form and substance, it was properly recorded as a deed, for the recorder must act upon the statements and recitals of the instrument, and he can not institute or conduct an inquiry for the purpose of determining whether the instrument is, or is not, what it appears to be. *Second.* The fact that the appellant did redeem settles the question as to the effect of the redemption with its incidents, although it does not conclude the appellee from questioning the capacity in which the appellant re-

deemed, nor estop her from requiring him to obey the statute in enforcing his lien.

We can not assent to the conclusion of appellee's counsel that the appellant is estopped from asserting that the instrument under which he claims is a mortgage, nor can we assent to the proposition that he asks what is against equity and good conscience in asking that the instrument be treated as a mortgage. If, as the complaint avers, and the demurrer admits, the instrument was executed to secure a debt, it was, in legal effect, a mortgage, and "once a mortgage always a mortgage." If it is a mortgage, then, the appellant was bound to so treat it, for "equity regards that as done which ought to be done." We are unable to perceive the slighest ground for holding that equity will not permit the appellant to treat the instrument as a mortgage. The person who executed it undoubtedly has a right to require him to so treat it, and the appellant would be guilty of a wrong if he should violate or disregard that right. Nothing has been done by the appellant contrary to conscience, so that the decision in *Kitts* v. *Willson*, 130 Ind. 492, is entirely without relevancy to the immediate point here under consideration.

If an instrument is a mortgage as to the grantor, it must necessarily be so as to the grantee; it is not one thing as to one of the parties and another thing as to the other party. It is true that there may be cases where the parties may be denied relief in a court of equity because they "do not come into court with clean hands," or because they seek to accomplish an unconscionable object, but this is not such a case. Here, as we have seen, there is no fraud on the part of the appellant, nor is he asking assistance to enable him to accomplish an illegal or wrongful object; on the contrary, he has given the true character of the instrument which invested him with a right to redeem, and he is seeking to do what the law authorizes, and nothing more. If it be true that he is a mortgagee—and the admitted facts impress upon him that character—then it must be true that his redemption was made

in that character, and no other. It is evident that if he had attempted to assert title as absolute owner, equity would, upon the state of facts shown in the complaint, have frustrated the attempt, and, therefore, where he comes forward in his true character, free from fraud, and asking what the law awards, he is entitled to the assistance he prays. Either this must be true or else it must be true that he is remediless, since he can not be both an owner and a mortgagee. A suitor who has done no wrong can not, where he has an enforceable right, be denied relief.

We find it impossible to escape the conclusion that the appellant effected the redemption from the sale made upon the decree rendered against the appellee and her husband in the capacity of a mortgagee, and not in that of the owner. As the redemption was made by him in the capacity of a mortgagee, the statute gives him a right to bring suit to establish and enforce the lien acquired by virtue of the redemption from the sheriff's sale. Section 774, R. S. 1881. He did not redeem as owner, for had he done so the case would be governed by a different provision of the statute. Section 770, R. S. 1881.

It is said by appellee's counsel that the complaint is bad because it does not aver that Benjamin Kinningham, the appellant's mortgagor, had title to the land, but we think this position rests upon an undue assumption. The complaint does allege that Kinningham and his wife executed a mortgage to James Hart, and that upon that mortgage Hart obtained a decree of foreclosure. It is well settled that a mortgagor is estopped to aver, as against his mortgagee, that he had no title to the land mortgaged. *Hill* v. *Meeker*, 23 Conn. 592; *Fisher* v. *Milmine*, 94 Ill. 228; *Bush* v. *Person*, 18 How. 82. In this instance we have both a mortgage and a decree of foreclosure based upon the mortgage, so that there can be no doubt that the facts pleaded are such as to require the conclusion that, *prima facie* at least, the mortgagors had title.

We can not do otherwise than decide this case upon the facts alleged in the complaint. We can not indulge in inferences or presumptions beyond those arising as matter of law upon the admitted facts. We are, indeed, bound to presume that the appellant has acted in good faith, for there is no averment to the contrary. The mere fact that the deed was absolute on its face, although executed as a security for a debt, does not of itself warrant the inference of fraud or wrong. What its probative influence would be, when conjoined with other facts, is quite a different question.

Our ultimate conclusion is that the complaint states facts constituting a *prima facie* case of sufficient strength to require an answer.

Judgment reversed.

MILLER, J., did not take any part in the decision of this court.

Filed May 12, 1892.

No. 15,706.

HORMAN ET AL. v. HARTMETZ.

STAY OF PROCEEDINGS.—*Petition for.—Necessary Averments.—Another Action Pending.*—In an action for judgment on a note and for foreclosure of a mortgage, where there is a petition for a stay of proceedings, in so far as the foreclosure of the mortgage is concerned, until the final determination of a cause between the same parties then pending in the Supreme Court for the cancellation of the mortgage, the petition is addressed to the equity side of the court, and must affirmatively state facts showing a defence, and that such defence is properly pleaded and presented in the case on appeal, and that the other action is prosecuted in good faith, and with a reasonable prospect of success.

From the Vanderburgh Superior Court.

J. H. Foster and *C. B. Harris*, for appellants.

S. R. Hornbrook, for appellee.

OLDS, J.—This is an action by the appellee against the appellants, Thomas and Elizabeth Horman, who are husband and wife, for judgment on a note and for foreclosure of a mortgage. The appellant filed a petition asking for a stay of proceedings in so far as the foreclosure of the mortgage was concerned until the final determination of a cause between the same parties then pending in the Supreme Court for the cancellation of the mortgage. The appellants allege in their petition that prior to the commencement of this action they brought suit against the appellee to cancel the mortgage, and say that in their complaint in said action they alleged among other things certain facts as a reason for the cancellation of said mortgage, and that final judgment was rendered against them in the circuit court and they excepted, filed a bill of exceptions and perfected an appeal to the Supreme Court, which is still pending.

We have no doubt that in a proper case on a sufficient showing a stay of proceedings may be had, but such an application is addressed to the equity side of the court, and must state facts affirmatively showing a defense, and that such defense is properly pleaded and presented in the other case on appeal, showing that the other action is prosecuted in good faith and with reasonable prospect of success. The showing in this case omits all of these elements. It is stated that certain facts are alleged in the complaint in the other action which would entitle them to a cancellation of the mortgage and prevent a foreclosure of it, but there is no averment that such facts are true. From aught that appears the facts which are alleged to have been averred in the complaint to cancel the mortgage, viz.: that the real estate was owned by the husband and wife as tenants by entireties and the mortgage executed to secure the debt of the husband, that the wife was only surety, and that she never received any of the money and no part of it was used for her benefit or the betterment of her estate may be untrue, and they may have no merit in this case pending an appeal. There is not

even an averment that the former action is being prosecuted on appeal in good faith, nor does it appear that any question is presented by the record in that case.

The showing is not sufficient to entitle the appellants to a stay of proceedings.

This is the only alleged error discussed by counsel, and all other questions are waived by a failure to discuss them.

Judgment affirmed with costs.

Filed May 14, 1892.

No. 15,758.

ENOS v. STATE, EX REL. GODER.

ELECTIONS.—*Failure to Make Certificate.—Presumption as to Public Officer.*—In an action against an inspector of an election board to compel him to make out and file with the clerk of the court the certificate provided for by section 3309, R. S. 1881, it must be presumed, in the absence of a showing to the contrary, that he and the judge of the election did their duty and that such return was made. Public officers are presumed to have done their duty until the contrary is shown.

SAME.—*Mandate.*—Upon the failure and refusal of the inspector to make the necessary return, mandate was the proper remedy to compel him to do so.

SAME.—*Mode of.—Statute as to Directory.*—Statutes regulating the mere mode of conducting an election are directory, and a departure from such mode will not generally defeat the successful candidate.

From the Fayette Circuit Court.

G. C. Florea and *L. L. Broaddus*, for appellant.

R. Conner, *H. L. Frost*, *D. W. McKee* and *J. I. Little*, for appellee.

COFFEY, J.—On the first Monday of May, 1890, the legal voters of the incorporated town of East Connersville, in Fayette county, held an election for the purpose of electing town officers. At such election the relator, Peter Goder,

and one Samuel D. Walker were opposing candidates for the office of trustee from the fifth ward in said town. There were one hundred and twelve votes cast, of which number the relator received sixty-six and Walker received forty-six. The appellant acted as the inspector at the election, John M. Lillie as judge, and George M. Williams as the clerk.

When the polls closed the inspector and judge proceeded to canvass the vote, with the result above stated.

There were some irregularities in the election, but it is not claimed that any illegal votes were cast, that any one who was entitled to vote was prevented from doing so, or that any fraud intervened. Nor is it at all disputed that the relator was duly elected.

This action was instituted for the purpose of compelling the appellant, as the inspector of the election, to make out and file with the clerk of the Fayette Circuit Court the certificate provided for by section 3309, R. S. 1881.

It is objected to the complaint that it is fatally defective for failing to allege that the election board made a certified return of the number of votes cast for each candidate at such election.

The complaint does allege that the election was duly and legally held. Assuming that the appellant and the judge were required to make a certified return of the number of votes cast for each candidate, we must presume, in the absence of a showing to the contrary, that they did their duty and that such return was made. Public officers are always presumed to have done their duty until the contrary is shown. *Baker* v. *Merriam*, 97 Ind. 539; *Cummins* v. *City of Seymour*, 79 Ind. 491. In our opinion the complaint states a cause of action.

We do not think the court erred in overruling the appellant's motion for a new trial.

From the poll-book and tally-sheet returned by the election board, it distinctly appeared that the relator was duly

elected to the office of trustee for the fifth ward, in the incorporated town of East Connersville. There was nothing uncertain as to the result of the election.

Statutes regulating the mere mode of conducting an election are directory, and a departure from such mode will not generally defeat the successful candidate. *Gass* v. *State, ex rel.*, 34 Ind. 425.

In this case there was but one inspector, the appellant. With the returns before him he was bound to know that the relator was duly elected, and it was his duty, in our opinion, to file the certificate required by the provisions of section 3309, *supra*, with the clerk of the Fayette Circuit Court within the time therein fixed. Having failed and refused to do so, mandate was the proper remedy. *Kisler* v. *Cameron*, 39 Ind. 488.

There was no prejudicial error committed by the court in the admission of evidence on the trial of the cause.

Judgment affirmed.

Filed May 12, 1892.

No. 15,402.

Pickett v. The Toledo, St. Louis and Kansas City Railroad Company.

Trespass.—*Tortious Entry upon Lands.—Statute of Limitations.—Change of Ownership.—Railroad.*—An action for damages for a tortious entry upon lands by a railroad company must be brought within six years after the cause of action has accrued. The action will not lie where there has been a change of ownership since the original trespass, and suit was brought more than six years after the commission of the trespass, but less than six years after the defendant succeeded in ownership to the original trespasser. Section 292, R. S. 1881.

From the Tipton Circuit Court.

J. C. Blacklidge, *W. E. Blacklidge*, *C. C. Shirley* and *B. C. Moon*, for appellant.

S. O. Bayless, *C. G. Guenther* and *C. Brown*, for appellee.

McBride, J.—The complaint in this case alleges a tortious entry upon certain lands belonging to the appellant by a predecessor of the appellee and the construction of a line of railroad thereon, which it is alleged is still maintained by the appellee as successor in ownership to the original trespasser. The appellee answered that the cause of action did not accrue within six years prior to the bringing of the suit. The appellant replied, admitting that the original trespass was committed more than six years before the commencement of the suit, but that the suit was commenced less than six years after the appellee succeeded to the ownership and possession of the line of railway, and that the operation of the road had been a continuing injury and damage to the land. The court sustained a demurrer to this paragraph of reply. This ruling presents the only question in the record. If the cause of action stated in the complaint is one that is barred by the six years statute of limitations the ruling of the circuit court was right.

The question may be regarded as settled by several decisions of this court, holding that when the action is brought, as in this case, to recover damages for the trespass, section 292, R. S. 1881, applies. That section provides that actions for injury to property, damages for any detention thereof, etc., must be brought within six years after the cause of action has accrued. The cause of action accrues when the unlawful entry is made. *Strickler* v. *Midland R. W. Co.*, 125 Ind. 412; *Porter* v. *Midland R. W. Co.*, 125 Ind. 476; *Shortle* v. *Terre Haute, etc., R. R. Co.*, *ante*, p. 338. The running of the statute is not affected by the change in ownership of the railway.

Judgment affirmed with costs.

Filed May 12, 1892.

No. 15,795.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS CONSOLIDATED RAILROAD COMPANY v. PRITCHARD, BY NEXT FRIEND.

NEGLIGENCE.—*Contributory.—Railroad.—Infant.—Improper Grade at Crossing.*—In an action against a railroad company to recover damages for personal injuries alleged to have been sustained by the plaintiff, by reason of being thrown out of a vehicle while crossing the defendant's track, at a highway or street crossing where the grade of the railroad had been constructed and maintained at a much higher grade than that of the highway, the fact that the injured party was an infant, and was driving the team at the time of the accident, does not of itself establish contributory negligence.

SAME.—*Synopsis of Evidence.*—The evidence fails to establish contributory negligence when it shows that the horses were gentle and docile; that the injured party, a girl of twelve, had driven them together a number of times within a short time previous to the accident; that she had driven in the vicinity of the railroads and cars, and across railroads; that the horses were not afraid of or liable to be frightened by the cars, and that she would have been able to have stopped them at the time of the accident if the railroad had been properly constructed at the crossing.

RAILROAD.—*Crossing Highway.—Duty to Restore to Previous Condition.—Failure to do so.—Liability for Damages.*—It is the duty of a railroad company upon building its railroad across a highway, to restore the highway as nearly as possible to its previous condition, and failing to do so the company is liable for damages sustained on account of injuries received by reason of the unsafe condition in which it was left, provided the injured party used care commensurate with the apparent danger.

From the Crawford Circuit Court.

N. R. Peckinpaugh and *J. H. Weathers*, for appellant.

R. J. Tracewell, *C. L. Jewett* and *H. E. Jewett*, for appellee.

OLDS, J.—This action is brought by the appellee against the appellant for damages resulting to appellee by reason of an injury sustained on account of the negligence of the appellant in permitting their railroad and track to remain out of repair and out of grade at a highway or street crossing.

It is alleged in the complaint that in constructing the railroad it was constructed at a grade fifteen feet higher than the grade of the highway, and the crossing was arranged so that there was a sharp and steep elevation and approach to the track on either side of the railroad, and that on either side of the railroad there was a drop from the top of the track to the top of the grade of the street or highway of some fifteen or eighteen inches, so that in crossing the track on said highway there was a sudden rise or jog of fifteen inches to pass over, and a sudden jog or drop of the same distance on going off the railroad track; that by reason of this sudden drop the appellee, Lota Pritchard, was thrown from the two-horse spring wagon in which she was riding, at the time she was driving across said track, and very seriously injured.

The first question presented relates to the sufficiency of the complaint. It is contended by the appellant that it is not sufficient for the reason that it appears from the averments that the appellee was an infant, and that she was driving the two-horse team, and *prima facie* it is negligence for an infant to drive a two-horse team, and, therefore, it shows the appellee to have been guilty of contributory negligence, and the demurrer ought to have been sustained to the complaint. Appellant cites no authority in support of this theory, and we do not think it a proper rule to adopt. The complaint does not state the age of the appellee. For aught that appears in the complaint, she may have been over twenty years of age at the time of the injury. It is alleged that she was without fault or negligence.

There are no averments in the complaint to show that she was guilty of contributory negligence. The fact that she was an infant and was driving the horses does not of itself establish contributory negligence. There was no error in overruling the demurrer to the complaint.

It was the duty of the appellant, upon building its railroad across the highway, to restore the highway as nearly as possi-

ble to its previous condition, and failing to do so, it was liable for damages sustained on account of injuries received by reason of the unsafe condition in which it was left, provided the injured party used care commensurate with the apparent danger. And as to whether due care was used or not is a question of fact for the jury. The complaint at least contains proper averments. *Indianapolis, etc., R. R. Co.* v. *State, ex rel.*, 37 Ind. 489; *Indianapolis, etc., R. R. Co.* v. *Stout*, 53 Ind. 143; *Evansville, etc., R. R. Co.* v. *Crist*, 116 Ind. 446; *Evansville, etc., R. R. Co.* v. *Carvener*, 113 Ind. 51.

It is urged that the evidence is not sufficient to sustain the verdict, and it is insisted that it was contributory negligence to leave a team of horses so near the railroad in charge of a girl of the age of the appellee.

There is evidence authorizing the jury to have found that the horses were gentle and docile, that appellee had been accustomed to driving one of them a great deal during the year prior, and had driven both of them together quite a number of times within a short time previous to the injury; that she had driven in the vicinity of the railroads and cars and across railroads, and that the horses were not afraid of or liable to be frightened by the cars, and did not frighten at them, and there was no reason to apprehend that the horses would become frightened at the cars or that there would be any danger in leaving them in charge of the appellee. The appellee at the time of the injury was twelve years of age, had been travelling for the past year with her father selling organs, and was accustomed to driving and handling these same horses. On this occasion the horses became frightened at a train coming from behind and passing them and turned around and started across the railroad at quite a rapid gait, though it does not appear from the evidence that the horses appeared to be extraordinarily frightened or that they were beyond the control of the appellee and running away, but the appellee testifies that as they went up the grade to the railroad she put her foot on the brake and that

she would have stopped them if it had been level, but that as the front wheels of the wagon dropped down when it went over the railroad it threw her out. The horses were stopped immediately afterwards in a very short distance from the track, and nothing whatever was injured. The appellee was using all the care she could under the circumstances in crossing the track, and was guilty of no fault. The jury may have properly found from the evidence in the case that the horses were started by the train, but the appellee was able to manage them, and had materially checked their gait when they reached the railroad track, and would have controlled and stopped them had it not been for the dangerous condition of the crossing, by reason of which she was thrown from the vehicle, and we think the evidence sustains the verdict. It does not present a case of horses taking fright at the lawful movement of the cars, and becoming unmanageable, running away and upsetting the vehicle or running against an obstacle and injuring a party. In such a case the railroad company would be guilty of no wrong. The horses took fright at the lawful act of the company, and the injury would be the result of the fright to the horses. But not so in the case at bar. The fright to the horses does not appear from the evidence to have been such as would have prevented the appellee from controlling them and avoiding all injury had she not been compelled to cross the track at a point where the appellant had failed to put it in repair, as it was its duty to do, and by reason of its negligence it had become and was dangerous to cross with vehicles, and in crossing the track at such point, by reason of such condition of the crossing, appellee was thrown from her buggy and injured without her fault.

Some objections are urged to the instructions given in the case, particularly to the action of the court in refusing to give the third instruction requested by the appellant as requested and modifying the instruction and giving it as modified. There was no error in the instruction as given,

and the instruction as requested was not applicable to the facts in the case, and would have had a tendency to mislead the jury, and the court properly modified it. We think the instructions fairly presented the law of the case, and we find no error in the record for which the judgment should be reversed.

Judgment affirmed with costs.

Filed May 12, 1892.

No. 16,391.

131 568
143 366
131 568
151 81

Holland *v.* The State.

Criminal Law.—*Abortion.—Sufficiency of Indictment.—Averment as to Intent.*—In an indictment for criminal abortion, charging that the defendant feloniously, unlawfully and wilfully employed an instrument in and upon the body and womb of a pregnant woman, with intent to produce a miscarriage, etc., the allegation "feloniously and unlawfully" applies to the intent with which the instrument was used, as well as to the use of the instrument itself.

Venue.—*Change of.—Ruling Upon Application for.—Bill of Exceptions.*—No question is presented upon the ruling of the court denying a change of venue when there is no bill of exceptions in the record containing the affidavits, rulings or exceptions.

Instructions to Jury.—*How Considered when Evidence not in Record.*—When the evidence is not in the record, instructions given by the court can not be regarded as erroneous if they can be considered as correct upon any state of facts admissible under the issues, and instructions requested and refused will be presumed to have been refused because not applicable to the facts of the case.

Same.—*Evidence Concerning Good Character.—Criminal Prosecution.*—Instructions to the jury in a criminal prosecution are erroneous which declare that if the jury find from the evidence, "independent of the evidence of good character," that there is a reasonable doubt of guilt then they should acquit, but that they must convict if they find, independent of the evidence of good character, that he committed the crime. The effect of these instructions was to deprive the accused of the benefit of evidence of good character, which they assume had been given. Evidence of good character is to be considered in connection

with other evidence upon the question of guilt or innocence, and it is not, as these instructions assert, to be considered apart from the other evidence.

From the Adams Circuit Court.

R. K. Erwin, J. F. Mann, J. T. France and *A. P. Beatty*, for appellant.

A. G. Smith, Attorney General, *G. T. Whitaker*, Prosecuting Attorney, and *J. F. France*, for the State.

ELLIOTT, C. J.—The first count of the information charges that "Elijah Holland and Jose Holland, on the 2d day of May, 1891, at the county of Adams and State of Indiana, did then and there feloniously, unlawfully and wilfully employ and use in and upon the body and womb of Daisy Reynolds, a pregnant woman, as they the said Elijah Holland and Jose Holland then and there well knew, a certain instrument, with intent then and there and thereby to produce miscarriage, it not being necessary to cause miscarriage to preserve the life of said Daisy Reynolds, by reason whereof said Daisy Reynolds languished until the 9th day of May, 1891, and died." It is objected that the allegation "feloniously and unlawfully" applies only to the use of the instrument, and not to the intent with which it was used. We think the allegation embraces both the intent and the act. It would be an unreasonable construction to narrow the allegation to the act and not extend it to the intent, for the entire pleading must be considered, and when so considered there can be no doubt as to the force and effect of the allegation. Our conclusion is fully sustained by the decided cases. *Taylor* v. *State*, 101 Ind. 65; *Rhodes* v. *State*, 128 Ind. 189; *Willey* v. *State*, 46 Ind. 363.

No question upon the ruling denying a change of venue is before us, for the reason that there is no bill of exceptions in the record containing the affidavits, rulings or exceptions. It has often been decided that such matters are not part of

the record proper, but must be brought into it by a bill of exceptions duly signed and filed.

Isolated and detached fragments of evidence appear in a bill of exceptions, but we can not determine from the meager statements whether there was or was not error in the rulings upon the evidence, assailed in the brief of counsel, much less can we say that the rulings were prejudicial or probably prejudicial. There are cases where the character and effect of rulings in admitting or excluding evidence may be determined without the presence of the entire evidence, but this is not one of them. For anything that appears, the evidence with which the parts stated in the bill were connected may have made it entirely proper for the court to rule, as it did, and in the absence of a countervailing showing we must presume that the trial court did not err in any of its rulings. The party who alleges error must affirmatively show error, and that it was prejudicial, or probably prejudicial, or his appeal will be unavailing. *Morningstar* v. *Musser*, 129 Ind. 470, and cases cited; *Stewart* v. *State*, 111 Ind. 554.

As the evidence is not in the record, we can not regard the instructions as erroneous if they can be considered as correct upon any state of facts admissible under the issues. We may say here, as well as elsewhere, that we can not adjudge that there was error in refusing the instructions asked by the appellant, for, as the evidence is not before us, we are bound to presume that they were refused because not applicable to the facts of the case. It is unnecessary to mention the instructions refused in detail; it is sufficient to say that we have carefully examined them, and find that such as were not covered by the instructions given by the court may well have been refused for the reason stated.

We are unable to resist the conclusion that the instructions of the court upon the subject of the weight to be attached to the evidence of the good character of the accused were radically erroneous, and such as can not be sustained

upon any supposable state of facts. One of the instructions upon this subject is this: "Evidence of previous good character may be considered by you in connection with all the other evidence given in the cause in determining whether the defendant would likely commit the crime with which he is charged, and if you find from all the evidence in the cause, independent of the evidence of his good character, that there is a reasonable doubt, then you should give him the benefit of his good character and acquit him." The other instruction given upon the subject reads thus: "If, however, you should find from all the evidence given in the cause, independent of the evidence of previous good character, that the defendant did commit the crime, or was present, aided or abetted, encouraged, counselled, directed and assisted in the same, evidence of previous good character would not avail him anything, and you should find him guilty." The effect of these instructions was to deprive the accused of the benefit of evidence of good character, which they assume had been given. They declare that if the jury find from the evidence, "independent of the evidence of good character," that there is a reasonable doubt of guilt, then they should acquit, thus making the evidence of good character utterly valueless, for, if there was a reasonable doubt of guilt the accused was entitled to an acquittal, whether his character was good or bad. The best character a man could obtain would avail nothing under the rule declared in these instructions, and yet good character is in law a thing of value and weight. To be sure, evidence of previous good character can not outweigh convincing evidence of crime, nor can previous good character avail where, giving it due weight, the evidence still proves the charge beyond a reasonable doubt. Good character is, however, a matter to be considered in determining whether an accused is or is not guilty of the offence charged against him, and it is to be assigned its proper weight upon that question. Evidence of good character is to be considered in connection with

other evidence upon the question of guilt or innocence, and it is not, as these instructions assert, to be considered apart from the other evidence. It may in some cases turn the scale in favor of the accused, but this it could not do in any case under such instructions as those given in this instance, for they do not permit good character to go into the scale at all. Our own decisions, as well as the decisions of other courts, declare that evidence of good character must be considered in determining the question of guilt or innocence. In *Kistler* v. *State*, 54 Ind. 400 (406), the authorities were fully reviewed, and a conclusion reached which these instructions oppose. In the case cited the court in concluding its opinion said: "The weight of modern authority seems to be overwhelmingly in favor of the rule that proof of good character constitutes an ingredient to be considered by the jury, in all criminal cases, without reference to the apparently conclusive or inconclusive character of the other evidence." Other cases in our own court affirm the doctrine of the case cited. *McQueen* v. *State*, 82 Ind. 72. Many other courts have asserted a like doctrine. See cases cited in 3 Am. & Eng. Encyc. of Law, 111.

Judgment reversed.

Filed May 13, 1892.

No. 15,1

The Phœnix Insurance Company of Brooklyn v. Perry.

INSURANCE.—*Loss by Fire.*—*Special Finding.*—*Notice of Loss.*—*Proof of Ownership.*—In an action on a policy of fire insurance providing that in case of loss or damage the assured shall forthwith give notice of said loss in writing to the company at its Chicago office, the special finding of the jury that the local agent of the company immediately notified the company at its Chicago office of the loss and the probable

amount of damage, and that the company sent its adjuster to estimate the loss, etc., shows a substantial compliance with said provision. While the finding does not state that the notice given was in writing, the first inference is that it was in writing, for it states that the agent sent to the defendant notice of said fire, that the notice gave the number of the policy, etc., and the appellant acted on the notice. The finding of the jury that the policy sued on was issued by the company to the plaintiff (it being stated in the policy that he was the owner of the property), sufficiently shows that the property destroyed was the property of the plaintiff.

From the Madison Circuit Court.

A. C. Ayres, *E. A. Brown* and *L. M. Harvey*, for appellant.

M. S. Robinson, *J. W. Lovett* and *S. M. Keltner*, for appellee.

OLDS, J.—The appellee brought this action against the appellant for loss sustained by reason of the burning of the buildings of the appellee which were insured by the appellant.

There was a trial by jury and a special verdict returned, and judgment upon the verdict in favor of the appellee.

Errors are assigned on the rulings of the court in overruling the appellant's motion for judgment in its favor on the verdict, and in sustaining the motion of the appellee for judgment in his favor.

The questions presented by both of these motions arise on the special verdict. It is contended by counsel for appellant that the verdict is insufficient to support a judgment in favor of the appellee, for the reason, as contended, that it does not find that proper notice and proof of loss was made, or that the appellee was the owner of the property destroyed.

The policy provides that payment will be made on receipt of proper proof of loss, at the appellant's Chicago office. Again it provides that in case of loss or damage the assured shall forthwith give notice of said loss, in writing, to the company. The complaint avers that appellee caused proper

proof of loss to be made to the appellant at its Chicago office.

It is stated in the policy that the appellee is the owner of the property. The verdict finds that the policy sued upon was issued, the premiums paid, and that the buildings were destroyed and the amount of the damages. It further finds that the local agent of the appellant immediately notified the company at its Chicago office of the loss and the probable amount of damages sustained, and that the appellant sent its adjuster to estimate the said loss under said policy, and that he investigated the loss and he made an estimate of the same. It further finds that appellant failed and refused to pay the plaintiff the loss sustained by him by reason of the destruction of his said property by fire. The policy does not point out any manner of making proof of loss or by whom or how notice shall be given, except that it shall be made in writing. The notice was given by the agent, and the appellant accepted such notice, and sent an adjuster, who made an estimate of the loss. The appellant accepted the notice given in the manner and by the person giving it. The object of the notice was to enable the appellant to have immediate opportunity to investigate the particulars as to the fire and estimate the amount of the loss; and acting upon the notice and statement of loss, given in the manner it was, it did investigate and make an estimate. While the finding does not state that the notice given by the agent was in writing the fair inference is that it was in writing, for it states that the agent sent to the defendant notice of said fire, that the notice gave the number of the policy, date of destruction of the building and probable amount of loss, and the appellant acted on the notice.

The averments of the complaint are that the appellee caused proper proof of the loss to be made at the Chicago office. The verdict finds that such notice was given at the Chicago office as the appellant accepted and acted upon and sent an adjuster. This, we think, is sufficient to sustain the

averments of the complaint and entitle the appellee to judgment. The verdict finds that the policy sued upon was issued by appellant to appellee, and it is stated in the policy that appellee is the owner of the property, and, as we interpret the verdict, it also finds that the property destroyed was the property of the appellee, and is sufficient on this point to entitle the appellee to judgment.

While the verdict is not as specific as it should have been, yet we think it is sufficient to entitle the appellee to judgment, and the appellant was not entitled to a judgment in its favor on the verdict.

There is no available error in the judgment.

Judgment affirmed.

Filed March 11, 1892; petition for a rehearing overruled May 12, 1892.

No. 15,352.

131 575
145 259

The Hoosier Stone Company *v.* The Louisville, New Albany and Chicago Railway Company.

Common Carriers.—*Contract to Furnish Suitable Cars.—Liability for Breach of.—Sufficiency of Complaint.—Measure of Damages.—Demurrer.*—In an action by a quarry company against a railway company for damages for breach of contract to furnish the quarry company with strong and amply sufficient and properly inspected cars for the transportation of the product of the quarry, the complaint alleged that the railway company had in its service a car inspector, whose duty it was to inspect the cars that were to be furnished the appellant; that a defective car was delivered to the plaintiff by the railway company; that its defective condition might have been discovered by the railway company on proper inspection, but that it carelessly and negligently failed to inspect the car, and knowingly delivered it to the plaintiff without inspection; that the plaintiff, relying upon the fact that the railway company had performed its duty to inspect, received from it said car, believing it to be safe and secure, the defect being hidden and unknown to the plaintiff; that the car, by reason of its defective condition and

without any default on the part of the plaintiff, broke loose and ran down a grade, killing one of the plaintiff's employees.

Held, that the complaint stated a good cause of action against the railway company for breach of duty.

Held, also, that as it can not be said that merely nominal damages are recoverable, the judgment sustaining the demurrer to the complaint must be reversed.

SAME.—*Estoppel.*—*Contributory Negligence.*—In such an action the defendant càn not successfully demur to the complaint on the ground that it does not show that the employee who was killed was free from contributory negligence, when the complaint avers that the railway company, through its general counsel and solicitor, represented the administrator of the deceased employee in an action brought by him against the quarry company for damages resulting from the death of his intestate, and that the railway company, after receiving notice from the quarry company of the pendency of the action, and that it would hold the railway company liable for all damages recovered, refused to defend said action, and the quarry company defended it at its own expense, and judgment was rendered against it. The conduct of the railway company in said behalf worked an estoppel, as a recovery could not have been had by the administrator if his intestate had been guilty of contributory negligence.

SAME.—*Judgment in Former Action.*— *When Inoperative as an Estoppel.*—The judgment recovered by the administrator against the quarry company did not preclude the latter from maintaining an action against the railway company for a breach of its duty as a carrier. The former action was for an injury resulting from a breach of duty owing by the quarry company to an employee, while the present action is brought for the breach of duty owing by a carrier to one for whom it had undertaken to carry goods or property. Further than this the railway company was not a party to the action in which the judgment was rendered, nor in privity with any of the parties in such a sense as to make the judgment available as an estoppel to the injury of the plaintiff.

PLEADING.—*Complaint.*—*Averment as to Special Damages.*—If a plaintiff states facts constituting a cause of action, an error in laying special damages does not invalidate the complaint when legal damages are recoverable.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

E. C. Field and *W. S. Kinnan*, for appellee.

ELLIOTT, C. J.—The material facts stated in the complaint of the appellant are these: The appellee is a railway com-

pany and the appellant is the owner of a stone quarry, and the former furnished to the latter a car for the transportation of heavy blocks of stone, knowing at the time of furnishing the car that the service of the latter required good and sufficient cars, and knowing, also, the grade of the track used by the latter, and that the nature of its business was such as to require sufficient brakes, brake cogs, ratchets and attachment. The railway company was under contract to furnish the appellant for the transportation of the products of its quarry such cars as were strong and amply sufficient for the purpose, and such as had been properly inspected. The railway company had in its service a car inspector whose duty it was to inspect the cars that were to be furnished the appellant, and of this fact it had knowledge. The appellant, relying upon the fact that the railway company had performed its duty to inspect, received from it a platform car. The car so received by the appellant was broken and insufficient, and the brake thereon insufficient and defective. All this might have been discovered on proper inspection by the railway company, but it carelessly and negligently failed to inspect the car, and knowingly delivered the same at the appellant's quarry without inspection. The appellant believed the car to be safe and secure, the defect being hidden and unknown to it. The car, by reason of the defective and insufficient brake and brake attachment, and without any fault on the part of the appellant, broke loose, ran down a grade and against James McCain, one of appellant's employees, thereby causing his death. The appellee, through its general counsel and solicitor, for the purpose of avoiding its liability, represented the administrator of James McCain in an action brought by him against the appellant for damages resulting from the death of his intestate. In that action the administrator charged the appellant with being responsible for negligently killing the deceased. The appellant gave the appellee notice of the action, and that it would hold the ap-

without any default on the part of the plaintiff, ... ist
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SAME.—*Estoppel.—Contributory Negligen...*
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company for damages re... gence. In our opinion the
the railway company, ... maintained. The appellee hav-
of the pendency of t... ges and the demurrer admits, rep-
pany liable for all ... ator in the action against the appellant,
the quarry comp... tion to insist that the judgment recovered
rendered agair... instrumentality is not valid because of the fault
behalf worke... intestate of the plaintiff in the action in which the
the admini... judgment was rendered. By representing the cause of the
ligence. plaintiff in that action, and procuring for him a judgment, it
SAME.—J... affirmed that he had a right to recover, and this he could not
judgr... have if his intestate had been guilty of contributory negli-
did ... gence, so that it effectively and necessarily asserted that there
was no such negligence on his part. Having impliedly asserted that there was no contributory negligence, and having conducted the action to avoid liability on its own part, and having secured a judgment for the administrator upon that assertion, it can not now be heard to say that the appellant can not recover because it does not aver that McCain was free from contributory fault. It is to be borne in mind that the allegations of the complaint that McCain's death was caused "without any fault of the appellant, and wholly by reason of the negligence" of the appellee, are confessed by the demurrer and these allegations, taken in connection with the averments concerning the judgment against the appellant and the part taken by the appellee in prosecuting the action in

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the original wrong-doer. What we
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ruling below, for the entire argument is based
single proposition that the ruling is right, because
complaint does not allege that McCain was not guilty of contributory negligrnce. There are, however, other reasons why the position of the appellee can not be sustained. As we shall presently show, the right of recovery against the appellee is not for the breach of duty upon which McCain's administrator recovered, but for a breach of a different duty. The duty which the complaint charges the appellee with violating was owing directly to the appellant.

It was undoubtedly the duty of the appellee to use due care and skill in inspecting the car furnished the appellant. A carrier is under a duty to exercise care, skill and diligence to provide those for whom it undertakes to transport property with safe cars and appliances. The complaint shows a clear and inexcusable breach of this duty. If substantial damages can be said to be the proximate result of this breach of duty there is a right of recovery. If the negligent breach of duty by the carrier had caused direct injury to the appellant, the case would be free from difficulty. If, for instance, the car had broken away and run against a building of the appellants thus destroying it, no one would doubt that the appellee would be liable for all damages resulting from the breach of duty. The only doubt that can possibly arise in the case upon the admitted facts is as to whether substantial damages can be recovered.

That there was a clear breach of duty on the part of the

pellee liable for all damages that might be recovered against it. The appellee refused to defend, and judgment was recovered against the appellant, although it defended the action and incurred expense in making a defence. It is averred of the accident to appellant's employee, that "All this was without any fault on this plaintiff's part, and wholly by reason of the wrongful and negligent acts and carelessness, in the manner hereinbefore set out, of the defendant."

It is argued by appellee's counsel that the ruling of the trial court adjudging the complaint bad is right, for the reason that the complaint does not show that James McCain was not guilty of contributory negligence. In our opinion the position assumed can not be maintained. The appellee having, as the complaint charges and the demurrer admits, represented the administrator in the action against the appellant, it is not in a situation to insist that the judgment recovered through its instrumentality is not valid because of the fault of the intestate of the plaintiff in the action in which the judgment was rendered. By representing the cause of the plaintiff in that action, and procuring for him a judgment, it affirmed that he had a right to recover, and this he could not have if his intestate had been guilty of contributory negligence, so that it effectively and necessarily asserted that there was no such negligence on his part. Having impliedly asserted that there was no contributory negligence, and having conducted the action to avoid liability on its own part, and having secured a judgment for the administrator upon that assertion, it can not now be heard to say that the appellant can not recover because it does not aver that McCain was free from contributory fault. It is to be borne in mind that the allegations of the complaint that McCain's death was caused "without any fault of the appellant, and wholly by reason of the negligence" of the appellee, are confessed by the demurrer and these allegations, taken in connection with the averments concerning the judgment against the appellant and the part taken by the appellee in prosecuting the action in

which that judgment was rendered, are sufficient without anything more to preclude the appellee from successfully asserting that the complaint is bad, for the reason that it does not specifically allege that McCain was free from contributory fault. The conduct of the appellee worked an estoppel, for it can not occupy contradictory positions. We do not put our conclusion upon the judgment, but upon the conduct of the appellee, who was the original wrong-doer. What we have said disposes of the argument of appellee's counsel in support of the ruling below, for the entire argument is based upon the single proposition that the ruling is right, because the complaint does not allege that McCain was not guilty of contributory negligrnce. There are, however, other reasons why the position of the appellee can not be sustained. As we shall presently show, the right of recovery against the appellee is not for the breach of duty upon which McCain's administrator recovered, but for a breach of a different duty. The duty which the complaint charges the appellee with violating was owing directly to the appellant.

It was undoubtedly the duty of the appellee to use due care and skill in inspecting the car furnished the appellant. A carrier is under a duty to exercise care, skill and diligence to provide those for whom it undertakes to transport property with safe cars and appliances. The complaint shows a clear and inexcusable breach of this duty. If substantial damages can be said to be the proximate result of this breach of duty there is a right of recovery. If the negligent breach of duty by the carrier had caused direct injury to the appellant, the case would be free from difficulty. If, for instance, the car had broken away and run against a building of the appellants thus destroying it, no one would doubt that the appellee would be liable for all damages resulting from the breach of duty. The only doubt that can possibly arise in the case upon the admitted facts is as to whether substantial damages can be recovered.

That there was a clear breach of duty on the part of the

appellee in negligently failing to do what its duty as a carrier required it to do is beyond controversy, and it is quite as certain that the duty which it violated was one owing to the appellant for whom it undertook to perform the duty of a common carrier. It knew, according to the confessed allegations of the complaint, the nature of the duty required of it by the character of the appellant's business, and in failing to furnish safe and fit cars for use in that business it violated a direct duty it owed to the appellant.

As the duty violated was one owing directly to the appellant, there was an actionable wrong, and the right of action was in the party to whom the duty was owing.

It may be true that, because of the remoteness of the injury, the representative of the estate of the employee of the appellant who was killed, could not have maintained an action against the appellee. It may be that the authorities require that conclusion. In the case of *State, ex rel.*, v. *Harris*, 89 Ind. 363, the question was considered, and many of the decided cases reviewed. *Dale* v. *Grant*, 5 Vroom (N. J.), 142; *Losee* v. *Clute*, 51 N. Y. 494; *Winterbottom* v. *Wright*, 10 M. & W. 109; *Curtin* v. *Somerset*, 30 Am. Law Reg. 503, and authorities cited in note. It is doubtful whether the appellant can successfully assert that it has a right to be reimbursed for the damages recovered by the administrator of the estate, but, granting that it has no such right, the question of whether there may be a recovery for the injury resulting to the appellant from the breach of duty directly owing to it is unaffected. The appellant may have a right of action for a negligent breach by the appellee, although it may not be entitled to all the damages claimed. It has long been established law that if a complaint states facts showing the plaintiff entitled to some relief, it will prevail against a demurrer, although it may ask more relief than the plaintiff is entitled to receive. *Bayless* v. *Glenn*, 72 Ind. 5; *McLead* v. *Applegate*, 127 Ind. 349 (351); *Shattuck* v. *Cox*, 128 Ind. 293 (294). If the complaint before us states facts entitling the appellant

to substantial damages, it is good against a demurrer even if it be conceded that it claims damages that the appellant has no right to recover.

As the complaint fully shows the breach of duty directly owing to the appellant, and shows that the appellant was itself without fault, there is a *prima facie* right to a recovery, unless the judgment obtained by the administrator concludes the appellant from maintaining an action against the appellee for a breach of its duty as a carrier. If this judgment concludes the appellant, the complaint is bad.

We may say, at the outset, that it certainly is not entirely clear that the appellee, being the original wrong-doer and having prosecuted the action on which the judgment was rendered in order to avoid liability on its own part, is in a situation to make that judgment a shield for its protection. This point we suggest, but do not decide.

The judgment in the action brought by the representative of the estate of the deceased employee does not conclude the appellant. There was no issue in that case involving the breach of duty owing directly to the appellant by the carrier. The issue in that case was joined between the representative of a person to whom the appellant owed a duty to furnish a safe working place and appliances, and the judgment could by no possibility conclusively determine the rights of the appellant as against the appellee for its negligent breach of duty as a common carrier. The duty which the appellee owed to its employee was not the duty which the appellant owed to it, and which is the basis of the complaint in this action. The duties are essentially different and distinct, and a judgment in an action for the breach of one of these duties can not conclusively determine the right to maintain an action for the breach of the other. As the former action was for an injury resulting from a breach of duty owing by the appellant to an employee, this action is not barred by the judgment in that action, inasmuch as the present action is brought for the breach of duty owing by a car-

rier to one for whom it had undertaken to carry goods or property. A judgment is conclusive upon the parties to the action as to all questions that were litigated or might have been litigated, but it is not conclusive upon any other questions.

The judgment in the action brought by the representative of the estate, McCain, does not preclude the appellant from showing that the appellee violated its duty for the further reason that it was not a party to the action in which the judgment was rendered, nor in privity with any of the parties in such a sense as to make the judgment available as an estoppel to the injury of the appellant. Judgments ordinarily bind only parties and privies, and the effect of the judgment must be reciprocal or there is no estoppel. *Dayton* v. *Fisher*, 34 Ind. 356. It is evident that this familiar principle precludes the appellee from employing the judgment for its own benefit, and that the appellant is not concluded by it as against the appellee.

Whatever view of the question may be taken, the conclusion must necessarily be that the appellant is not estopped by the judgment in favor of the administrator of McCain's estate. As the judgment is no barrier to a recovery by the appellant, its right of recovery depends upon the facts stated showing a duty and its breach.

We give no judgment upon the effect of the notice to defend given by the appellant to the appellee, for the reason that counsel do not argue that question. Independently of the averments of the complaint concerning the notice, there are facts showing an actionable wrong, and that the right of action for that wrong is in the appellant. It may be that there is much surplusage in the complaint, but as surplusage does not vitiate it does no harm even if it does no good.

It may be granted that the statements of special damages are ill, and yet it would by no means follow that the complaint is bad. The amount of recovery is not important in considering a demurrer to a complaint, for the question of

the measure of damages is not presented by demurrer. If a plaintiff states facts constituting a cause of action, an error in laying special damages does not invalidate the complaint in a case where legal damages are recoverable. It is true that where the court can see from the complaint that merely nominal damages are recoverable in any event, it will not reverse the judgment even if the complaint is bad; but we can not say upon the facts here stated that only nominal damages can be recovered. It may well be that the appellant, under the general claim for damages and upon due evidence of the facts stated, may recover damages of a very substantial character, even though it be conceded that the measure of damages is not the sum paid McCain's administrator or the sum expended in defending the former action.

It is no doubt true that a complaint must proceed upon a definite theory, and on that theory state facts sufficient to constitute a cause of action, but this familiar rule does not go so far as to require the court to hold that a complaint which proceeds upon a definite theory and states the proper facts is bad because special damages are claimed that the law will not award. An improper statement of damages will not make a complaint bad if the facts essential to a cause of action are stated.

We give no opinion upon the question as to the measure of damages. We go no further upon this question than to adjudge that the facts stated in the appellant's complaint show a right of action entitling it to some damages for the wrong done by the appellee in violating its duty as a common carrier. We do not decide whether the appellant can or can not recover for the sum paid to the administrator of McCain or for the expenses incurred in defending the action brought by him. We do decide that a right of action is shown, and that we will not apply the doctrine asserted in the cases which hold that where it appears that in no event can more than nominal damages be recovered the court will not reverse a judgment. We are unwilling to hold that un-

der the complaint only nominal damages are recoverable. The question as to the measure of damages is an important and difficult one, and as it is not touched upon in the argument of counsel, we leave it entirely open and undecided.

Our ultimate conclusion is that, whatever may be the true rule as to the measure of damages, the complaint is sufficient to require an answer, inasmuch as the facts stated show a *prima facie* right of recovery.

Judgment reversed.

Filed May 18, 1892.

131	584
136	537
131	584
155	489

No. 16,503.

The Dayton Gravel Road Company v. The Board of Commissioners of Tippecanoe County et al.

Gravel Roads.—*Remonstrance Against Purchase of.—Order of County Commissioners Sustaining.—Appeal from.*—Where the board of county commissioners, after the preliminary steps had been taken, looking to the purchase of a gravel road, sustained a remonstrance filed before it, against completing the purchase, and entered an order to that effect, and an appeal was taken from such order to the circuit court by the company, the court did not err in overruling a motion filed by the appellant for an order on the board of commissioners to issue the bonds of the county to it in payment for its toll road. The remonstrance set forth that the appellant had no title to a portion of the road which had been appraised, and the issue thus tendered remained untried and undetermined.

Same.—*Description of Road in Petition.—Sufficiency of.*—A petition filed with the board of county commissioners for an election on the question of purchasing a gravel road, need only contain such a description of the road as will enable the surveyors and viewers to find and identify the road which is to be made the subject of purchase.

Same.—*Order of County Commissioners.—Right of Company to Appeal.*—The gravel road company, though not a party of record to the proceedings before the board of commissioners, had such an interest in the matter involved as to authorize it to prosecute an appeal to the circuit court.

SAME.—*Refusal to Purchase.—Final Judgment of County Commissioners.—Where Appeal from Lies.*—The final judgment of the board of commissioners refusing to purchase the gravel road involved judicial action from which an appeal would lie, and the only remedy to which the appellant was entitled was that of an appeal to the circuit court.

SAME.—*Sufficiency of Petition.—Judgment of County Commissioners Upon.*—Where the board of commissioners ordered an election to pass upon the question of the purchase of a gravel road, it necessarily passed upon the sufficiency of the petition requesting such an election, and having the right to determine whether or not it would proceed on the petition, and having determined that it would proceed, its judgment was not void.

COUNTY COMMISSIONERS.—*Appeal from.—What Questions can be Considered—Jurisdiction.*—Upon appeal from the board of commissioners to the circuit court no questions can be considered except such as were presented and involved in the commissioners' court, save the question of jurisdiction.

From the Tippecanoe Circuit Court.

A. Rice, W. S. Potter, J. R. Coffroth and *W. R. Coffroth*, for appellant.

J. B. Milner, J. M. Lowe, D. P. Vinton and *H. H. Vinton*, for appellees.

COFFEY, J.—On the 15th day of October, 1890, certain of the resident freeholders of the townships of Sheffield, Fairfield and Wea, in Tippecanoe county, filed with board of commissioners of that county the following petition, namely:

"We, the undersigned, respectfully represent to your honorable board that the Dayton Gravel Road is a toll road, running through and located in the townships of Fairfield, Wea and Sheffield, in said county.

"We further represent that each of the subscribers to this petition is a freeholder and citizen of one of the above named townships, and that each township is herein below set opposite his name.

"The undersigned respectfully petition your honorable board to submit to the voters of the above named townships of Fairfield, Wea and Sheffield, through which said townships said road passes, the question of purchasing said Day-

ton Gravel Road, and to take the necessary steps provided by law for holding such election for that purpose."

This petition was signed by twenty-eight persons residing in Fairfield township, twenty-five residing in Sheffield, and three residing in Wea. Such proceedings were had upon it as that the road was surveyed, fixing its exact course and distance, and fixing the consideration to be paid for it. The board of commissioners then submitted a proposition to the Dayton Gravel Road Company to purchase the road at the consideration fixed by the viewers sent out by it, which was accepted. Thereupon an order was entered for an election, the election held, and the vote canvassed, resulting in a majority in favor of purchasing the Dayton Gravel Road.

After the result of the election was ascertained, the appellees, Benton Steel, Peter Goldsberry and John R. Bladden, appeared before the board of commissioners and filed a remonstrance against completing the purchase, and the board, after due consideration, sustained the remonstrance, and entered an order refusing to complete the purchase of the appellant's road. This order was entered on the 8th day of February, and the 20th day of the same month an affidavit was filed on behalf of the appellant, and appeal taken to the Tippecanoe Circuit Court. In the circuit court the appellant filed a motion for an order against the appellee, the board of commissioners, requiring it to complete the purchase of the appellant's road, which motion was overruled by the court.

The appellees filed a motion to dismiss the appeal, which was sustained by the court, and the appeal dismissed.

The appeal was dismissed, as stated in a bill of exceptions, for the following reasons:

1st. Because the petition filed by the petitioners before the board of commissioners was insufficient, in this, that it contained no description of the Dayton Gravel Road.

2d. Because there is no description of the gravel road in the order issued to the viewers appointed by the board of

commissioners to view and assess the price to be paid for the road.

3d. Because the appellants did not possess the right to appeal.

The appellant assigns as error:

First. That the court erred in overruling its motion for an order on the board of commissioners directing it to issue to the appellant bonds of the county in payment for its toll road.

Second. That the court erred in sustaining the motion of the appellees to dismiss the appeal.

In our opinion the court did not err in overruling the motion of the appellant for an order on the board of commissioners of Tippecanoe county to issue the bonds of the county to it in payment for its toll road. The remonstrance filed before the board sets forth that the appellant had no title to a portion of the road which had been appraised, and the value of which constituted a part of the consideration to be paid for the purchase. If it be true, as alleged in the remonstrance, that there was a want of title to a portion of the road, certainly the board of commissioners, as the agents of those who were to be assessed for the payment of the consideration agreed upon between the board and the appellant, should not be compelled to complete the purchase, and pay for that which could not be conveyed to it. The want of title would, in our opinion, constitute a legal excuse for refusal to complete the purchase. While this issue, tendered by the remonstrance, remained untried and undetermined, the court could not enter an order requiring the board of commissioners to issue to the appellant the bonds of the county in payment for its toll road.

It is earnestly contended by the appellees that the petition above set out is fatally defective in that it contains no description of the toll road, the purchase of which the petitioners desire to make.

In deciding the question here presented, it is important to

keep in view the well-known rule that upon appeal from the board of commissioners to the circuit court no questions can be considered except such as were presented and involved in the commissioners' court. *Hardy* v. *McKinney*, 107 Ind. 364; *Metty* v. *Marsh*, 124 Ind. 18.

One exception to this rule is that the question of jurisdiction may be raised in the circuit court though it was not presented to the board of commissioners.

As this matter was not raised before the board the question, therefore, for our consideration is as to whether this petition was sufficient to confer jurisdiction on the board of commissioners of Tippecanoe county. As to whether a tribunal has jurisdiction of a general class of cases is to be determined by the law, and as to whether it has jurisdiction of a particular case belonging to that class depends on the facts in that particular case. Elliott Roads and Streets, p. 227.

An act of the General Assembly, approved March 8th, 1889, acts 1889, p. 276, confers upon the boards of county commissioners of the several counties in the State exclusive original jurisdiction over the class of cases to which this belongs, and prescribes the mode by which such boards may acquire jurisdiction over any particular case.

To give the board jurisdiction over a particular case some petition must be filed, signed by the number of freeholders named in the act. When such petition is filed it is the especial province of the board, called upon to act, to determine its sufficiency. Before the board of commissioners of Tippecanoe county could order the election, it necessarily passed upon the sufficiency of the petition in this case. Having the right to determine whether or not it would proceed on this petition, and having determined that it would proceed, thus giving judgment on the sufficiency of the petition, its judgment was not void. Elliott Roads and Streets, *supra*; *Lantz* v. *Maffett*, 102 Ind. 23; *Quarl* v. *Abbett*, 102 Ind. 233; *Smurr* v. *State*, 105 Ind. 125.

In determining the sufficiency of the petition, it is not improper to take into consideration the necessary steps to be observed as prescribed by the act under which this proceeding was had. Section 1 provides that after filing the petition, and before the election is advertised, it shall be the duty of the board of commissioners to appoint a surveyor or engineer of the county and two disinterested freeholders as viewers, one appointed by the board and one by the company, to view the road and determine the consideration to be paid therefor.

This was done in the case before us, and the surveyor and viewers proceeded to view and survey the road to be purchased, and made their report, giving a particular description of the road by course and distance and dividing it into sections, with a valuation of each section, separately, and a valuation of the entire road, so that when the election was held there was on file in the cause, and constituting a part of the record, an accurate description of the road and the amount to be paid by each township through which it runs. This we think was the proper practice. Under this practice the only description required in the petition is such a description as will enable the surveyor and viewers to find and identify the road which is to be made the subject of purchase. In determining the sufficiency of such description it must be borne in mind that the road is already opened and in use as one of the highways of the county, so that it need not be described with the same particularity as a highway which is to be established and opened. In this petition the toll road to be purchased is described as "the Dayton Gravel Road, a toll road running through and located in the townships of Fairfield, Wea and Sheffield, in said county."

We can not say that this description was too imperfect to enable the surveyor and viewers to find and identify the road which they were called upon to view and appraise, and inasmuch as no objection was made to it before the board of

commissioners, and that tribunal adjudged it sufficient, we think it should be held sufficient to confer jurisdiction.

What we have said with reference to the petition applies with equal force to the order issued to the viewers.

The question as to whether the appellant in this case had the right to appeal from the judgment of the board of commissioners refusing to consummate the purchase of its road still remains for consideration.

Section 5772, R. S. 1881, provides that from any decision of the board of commissioners there shall be allowed an appeal to the circuit court by any person aggrieved; but if such person shall not be a party to the proceeding such appeal shall not be allowed unless he shall file, in the office of the county auditor, an affidavit setting forth that he has an interest in the matter decided, and that he is aggrieved by such decision, alleging explicitly the nature of his interest.

It is objected that the appellant in this case was not a party in the proceeding before the board of commissioners, and that the affidavit filed in its behalf does show an interest authorizing it to appeal.

The appellant was, in a sense, a party to the proceeding before the board of commissioners. Before the board could take any step looking to the purchase of the toll road, it was necessary that the appellant should choose one of the viewers; and before an election could be ordered, it was necessary that the board should submit to the appellant a proposition to purchase the road, and that such proposition to purchase should be accepted. While this did not, perhaps, make the appellant a party to the proceeding in the ordinary sense, we think the affidavit filed is sufficient to show such an interest in the matter involved as to authorize the appellant to prosecute an appeal to the circuit court. *Grusenmeyer* v. *City of Logansport*, 76 Ind. 549; *Padgett* v. *State*, 93 Ind. 396; *State, ex rel.*, v. *Board, etc.*, *ante*, p. 30.

The final judgment of the board of commissioners refusing to purchase the appellant's road involved judicial action,

from which an appeal will lie, and the only remedy to which the appellant was entitled was that of an appeal to the circuit court. *Gilson* v. *Board, etc.*, 128 Ind. 65; *State, ex rel.*, v. *Board, etc., supra.*

In our opinion the circuit court erred in sustaining the motion of the appellees to dismiss the appeal in this cause.

Judgment reversed, with directions to overrule the motion of the appellees to dismiss the appeal in this cause, and for further proceedings not inconsistent with this opinion.

Filed May 17, 1892.

131	591
138	210
131	591
165	506

No. 16,474.

Cole, Administrator, *v.* State, ex rel. Hopper, Trustee.

School Trustee.—*Tax Levy for Special School Purposes.—Refusal of Auditor to Enter Levy.—Mandamus.*—Where the trustee of a school township makes and files in the auditor's office of the county his annual tax levy for special school purposes, and the auditor refuses to make the assessment, or to enter a levy upon the duplicate, a mandamus proceeding to compel him to do so is properly brought in the name of the State on the relation of the school trustee. His duty does not end when he makes and reports the levy which the statute requires him to make and report, but continues until he has done what it is reasonable to do to recover the collection of the special tax levied by him.

Same.—*Petition for Mandamus.—Interest of Trustee Need Not be Averred.*—The petition in such a case need not specifically aver that the relator has a special interest in the performance of the duty which he asks the court to coerce the auditor to perform. Where the facts pleaded show the special interest, a specific allegation is unnecessary.

Same.—*Abuse of Discretion by.—Return to Writ of Mandate.—Insufficiency of.*—An averment in a paragraph of return to the alternative writ of mandate that the levy made by the board of county commissioners was sufficient for special purposes, and that there was no necessity for the levy made by the relator, adds no force to the return. The law invests the trustee with a discretionary power to determine, within the prescribed limits, the amount of the levy, and no other officer or officers can

exercise that power. An abuse of that discretion must be shown before the courts will interfere.

SAME.—*Pleading Custom.*—A paragraph of return to the alternative writ of mandate is bad which alleges that the defendant, in refusing to make the assessment, etc., was following a custom which had long prevailed in the auditor's office. The duties of the trustee and auditor are prescribed by law, and what the law prescribes custom can not affect.

SAME.—*Levy for Special School Tax.—County Commissioners Need not Approve.*—The trustee of a school township is authorized by law to levy a special school tax without the approval or concurrence of the board of county commissioners. Section 4467, R. S. 1881.

PUBLIC OFFICER.—*Refusal to Perform Positive Duty.*—If in any case a public officer can excuse a refusal to perform his positive duty because of the lack of time, he must state specific facts clearly and fully, showing why the duty can not be performed. Mere general statements can not supply the place of facts.

From the Harrison Circuit Court.

B. P. Douglass and *M. M. Frank*, for appellant.

G. W. Self, for appellee.

ELLIOTT, C. J.—The relator avers, in his petition, that he is the trustee of Blue River school township of Harrison county, Indiana; that on the 21st day of September, 1891, the appellant was, and since has been, the auditor of Harrison county; that on the day aforesaid the relator, as trustee, made and filed in the auditor's office his annual tax levy for special school purposes for the year 1891; that at the time of making and filing the levy he demanded of the appellant, as such auditor, that he make the proper assessment and charge the same upon the duplicate of the county; that the levy so made by the relator was and is necessary to raise funds to keep school-houses and other property in repair, to purchase school furniture, apparatus, fuel and other necessaries for the use of the schools of the township; that the appellant refused to make the assessment or to enter a levy on the duplicate.

There is no substantial merit in the appellant's contention that Hopper, the trustee, is not a proper relator. This is not an action to enforce a liability upon a contract in favor

of the township, nor to establish such a liability against it, but it is a proceeding by an officer charged with a specific duty to enforce the performance by another officer of a like specific duty imposed upon him by law. The decisions in such cases as *Vogel* v. *Brown Tp.*, 112 Ind. 299, and *Wright* v. *Stockman*, 59 Ind. 65, are not of controlling influence. Nor is it an action to determine to whom the taxes, when collected, will belong, but it is an action by an officer charged as an officer with taking measures to levy and collect a tax. This duty rests upon the officer, and not upon the public corporation, so that he is entitled as such officer to the assistance of the court to enable him to effectively perform the duty enjoined upon him by law. His duty does not end when he makes and reports the levy which the statute requires him to make and report, for it continues until he has done what it is reasonable to do to secure the collection of the special tax levied by him.

There is no strength in the position that the petition is bad because it does not specifically aver that the relator has a special interest in the performance of the duty which he asks the court to coerce the auditor to perform. Where the facts pleaded show the special interest, a specific allegation is unnecessary. The facts here averred show such an interest. The relator was, as we have seen, charged with a special duty, and in whatever directly concerns that duty he has in the strictest sense a special interest which the courts will heed, and, heeding, give him due assistance to vindicate his rights.

The second paragraph of the appellant's return to the alternative writ alleges that the relator, after making the levy, reported it to the board of commissioners for approval on the 14th day of September, 1891; that the board did not approve the levy made by the relator, but, on the contrary, determined upon and levied a special school tax of fifteen cents on the one hundred dollars; that, to quote the words

of the pleader, "by a custom which has prevailed in the auditor's office ever since township trustees 'have been authorized by law to levy such taxes,'" the defendant at once proceeded to formulate his tax tables for the current year, including special school taxes as concurred in and determined upon by the board of commissioners; that by reason of the changes made by the act of 1891 in the time of making the levies of taxes for county and other purposes, the defendant is greatly pressed for time, so that it "is next to impossible for him to discharge his duties within the time prescribed."

It is evident that some of the allegations of this pleading must be entirely disregarded. The allegation we have quoted concerning custom is entirely destitute of force if it be true, as is alleged, that the duties of the trustee and auditor are prescribed by law. What the law prescribes custom can not affect. If there is a law upon the subject it must be obeyed, and there can not be one custom, or usage, in one county, and another, or others, in some other county or counties.

The averments attempting to excuse the auditor from performing his duty are clearly insufficient. If in any case a public officer can excuse a refusal to perform his positive duty because of the lack of time, he must state specific facts clearly and fully showing why the duty can not be performed. Mere general statements can not supply the place of facts.

The only question of substantial merit which the pleading under immediate mention presents is as to the authority of a township trustee to levy a special school tax without the approval or concurrence of the board of county commissioners. If the concurrence of the board is required the return is sufficient, otherwise it is bad. If the law authorizes the levy of the special tax without any action by the board, the auditor and the members of the board were bound to know and obey the law.

It is important to bear in mind that the tax which the trustee seeks to compel the auditor to place upon the tax duplicate for collection is a special school tax. This is im-

portant for the reason that the statute makes a distinction between special school taxes and other township taxes. The statutory provision respecting the levy of township taxes for general purposes does require the concurrence of the board of commissioners. Section 5995, R. S. 1881. As this provision expressly mentions one class of taxes, the implication is that other classes are excluded. This would be the general rule even if there were no provision expressly naming another class of taxes and declaring how taxes of that class shall be levied, and it is all the stronger where, as here, there is another statutory provision expressly declaring how the taxes of the excluded class shall be levied. The statutory provision to which we have just referred reads thus: "The trustees of the several townships, towns, and cities shall have the power to levy a special tax, in their respective townships, towns, or cities, for the construction, renting, or repairing of school-houses, for providing furniture, school apparatus, and fuel therefor; and for the payment of other necessary expenses of the school, except tuition, but no tax shall exceed the sum of fifty cents on each one hundred dollars worth of taxable property, and one dollar on each poll, in any one year, and the income from said tax shall be denominated the special school revenue." Section 4467, R. S. 1881. The language employed in the statute is neither ambiguous nor obscure, so that we need not look beyond it to ascertain the meaning of the Legislature. That meaning, as the words used clearly express it, is that the officers of the school corporation shall make the levy for the special school revenue. There is a plain reason why this should be so. The city, town and township officers are classed together (the statute applies to all such officers), and it would, as is readily conceivable, be unwise to vest officers elected by a county with control over the affairs of a city or town, for cities and towns, as well as townships, are essentially different political organizations. County commissioners, as we all know, are chosen to conduct county affairs, and

not such purely local matters as town, township or city schools. If we look, as it is of course proper to do, to other provisions of the statute concerning schools we shall find abundant evidences of the intention of the Legislature to vest the control of local schools in local city, town or township officers. It is not reasonable, under such a system as ours, that county officers should have control of local schools, and in the absence of an express statute clearly giving them such control there can be no inference that county officers can control or govern them or their special revenues, but we are not left to inference for the positive law very plainly places the power in the hands of the local school officers. There was, therefore, no error in sustaining the demurrer to the second paragraph of the return.

The third paragraph of the appellant's return contains substantially the same allegations as the second, but it also contains the additional allegation that the levy made by the board of commissioners is sufficient for special purposes, and that there was no necessity for the levy made by the relator. This allegation adds no force to the return. The law invests the trustee with a discretionary power to determine, within the prescribed limits, the amount of the levy, and no other officer or officers can exercise that power. It is well settled that where an officer is invested with a discretion its exercise can not be controlled nor the authority taken from him. *Weaver* v. *Templin*, 113 Ind. 298, and cases cited. See authorities cited in Elliott Roads and Streets, p. 276, note 2, p. 297, note 2; *City of Fort Wayne* v. *Cody*, 43 Ind. 197; *Davis* v. *Mayor, etc.*, 1 Duer, 451. It is undoubtedly true that the courts may prevent injustice resulting from an abuse of discretion, but no such case is before us.

Judgment affirmed.

Filed May 21, 1892.

No. 15,879.

KEADLE, ADMINISTRATOR, v. SIDDENS.

APPELLATE COURT.—*Jurisdiction of.—Actual Amount in Controversy Determines.*—In a suit for the recovery of money only, when an examination and comparison of the several paragraphs of complaint make it apparent that the cause of action stated or attempted to be stated in each grows out of the same transaction, and that the actual amount in controversy is three hundred dollars instead of twelve hundred dollars, the *prima facie* amount in controversy, the jurisdiction of the cause is in the Appellate Court.

From the Benton Circuit Court.

A. Rice and *W. S. Potter*, for appellant.

M. H. Walker and *G. H. Gray*, for appellee.

McBRIDE, J.—The only question presented by the record in this case arises on a ruling of the court below, sustaining a demurrer to the complaint. The consideration of this question, however, raises a preliminary question of jurisdiction, and requires us to determine whether this court or the Appellate Court has jurisdiction of the appeal.

The suit is for the recovery of money only. The complaint is in four paragraphs. The demand in each paragraph is for $300.

Prima facie, the amount in controversy is $1,200. This would place the jurisdiction in this court. The amount in controversy, however, must be determined from the entire record, and from the material parts of the pleadings, and not from the formal demand for judgment. *Ex parte Sweeney*, 126 Ind. 583–588, and cases cited; Elliott's Appellate Procedure, section 56. An examination and comparison of the several paragraphs of complaint make it apparent that the cause of action stated, or attempted to be stated, in each grows out of the same transaction, and is substantially the same in all. The actual amount in controversy, therefore, is only $300. The jurisdiction of the cause is in the Appel-

late Court, and the clerk is directed to transfer it to the docket of that court.

Filed May 17, 1892.

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131 598
132 600
131 598
f162 541

No. 16,415.

Luzadder v. The State, for Use of Rhine, Commissioner of Drainage.

Drainage.—*Defective Description of Land.—Correction of.*—Where the complaint clearly shows the land intended to be benefited, and that the defective deseription of the land was caused by the mistake of the drainage commissioner, the description may be corrected and the assessment enforced against the land intended.

From the Blackford Circuit Court.

R. S. Gregory, A. C. Silverburg and *J. N. Templer*, for appellant.

W. H. Carroll, G. D. Dean, B. G. Shinn and *E. Pierce*, for appellee.

Elliott, C. J.—The only question in this case not settled by the decisions in the cases of *Racer* v. *State, etc., ante*, p. 393, and *Curry* v. *State, etc., ante*, p. 439, is that which arises upon the contention of the appellant's counsel that the description of the land assessed is so defective as to make the assessment ineffective.

The description is so radically defective that the assessment can not be enforced unless corrected. A valid description is essential to the validity of an assessment. *Zigler* v. *Menges*, 121 Ind. 99; *Ross* v. *State, etc.*, 119 Ind. 90. This is conceded by the appellee's counsel, but it is insisted that, as the complaint shows that the defect was caused by the mistake of the drainage commissioner it may be corrected, the description reformed, and the assessment enforced against the

land intended. This position is sustained by the case of *State, ex rel.*, v. *Smith*, 124 Ind. 302. See, also, *Craven* v. *Butterfield*, 80 Ind. 503. We think that the complaint so clearly shows the land intended to be benefited, and shows the mistake in describing it, that the relator was entitled to have the mistake corrected.

Judgment affirmed.

Filed May 19, 1892.

No. 15,267.

THE GREENFIELD GAS COMPANY v. THE PEOPLE'S GAS COMPANY ET AL.

From the Hancock Circuit Court.

D. S. Gooding, for appellant.

J. A. New, *C. G. Offutt* and *R. A. Black*, for appellee.

COFFEY, J.—The only question discussed by counsel for the appellant in this case relates to the right of the appellees to explode nitro-glycerine in their gas well for the purpose of increasing the flow of gas. The question presented is the same as that which arose on the first cause alleged for an injunction in the case of *People's Gas Co.* v. *Tyner*, *ante*, p. 277, and upon the authority of that case the judgment in this case is affirmed.

Filed April 30, 1892.

No. 16,546.

ALLEN v. THE STATE.

From the Vigo Circuit Court.

W. P. Fishback, *W. A. Kappes*, — *Mack*, — *Henry*, *J. E. Piety* and *J. D. Piety*, for appellant.

A. G. Smith, Attorney General, for the State.

OLDS, J.—This is a prosecution against the appellant in which he is charged with contempt of court. The facts in this case are substantially the same as those in the case of *Fishback* v. *State*, *ante*, p. 304. The charge is the publication of the same newspaper articles upon which the charge of contempt is based in that case, and upon the authority of that case this case is reversed, with instruction to grant a new trial, and proceed in accordance with the law as stated in said cause of *Fishback* v. *State*, *supra*, and discharge the appellant.

Filed April 22, 1892.

No. 16,405.

Gilchrist v. The State, for Use of Rhine, Drainage Commissioner.

From the Blackford Circuit Court.

R. S. Gregory, *A. C. Silverburg* and *J. N. Templer*, for appellant.

By the Court.—The questions in this case are the same as those decided in the case of *Racer* v. *State, etc.*, *ante*, p. 393, and *Curry* v. *State, etc.*, *ante*, p. 439, and upon the authority of those cases the judgment is affirmed.

Filed April 30, 1892.

15,583. Ewing v. Cones et al.; 15,584. Ewing v. Wade et al.; 15,585. Ewing v. Carr et al.; 15,586. Ewing v. Boggs et al.; 15,587. Ewing v. Parke et al.; 15,588. Ewing v. Williamson et al.; 15,589. Ewing v. Lumaree.

By the Court.—The judgment in each of the above named cases is reversed upon the authority of *Ewing* v. *Lutz*, *ante*, p. 361, and the cases therein cited.

Filed April 23, 1892.

No. 16,406. Buckles v. State, etc.; No. 16,407. Crumley v. State, etc.; No. 16,408. Constant v. State, etc.; No. 16,410. Fulkerson v. State, etc.; No. 16,411. Johnson v. State, etc.; No. 16,412. Brown v. State, etc.; No. 16,413. Kitzmiller v. State, etc.; No. 16414. Lock v. State, etc.; No. 16,416. McKay v. State, etc.; No. 16,417. Inman v. State, etc.; No. 16,418. Inman v. State, etc.; No. 16,419. Edwards v. State, etc.; No. 16,420. Barnes v. State, etc.; No. 16,421. Martin v. State, etc.; No. 16,422. Wayman v. State, etc.; No. 16,423. Thornburg v. State, etc.; No. 16,424. Fishback v. State, etc.; No. 16,425. Wilson v. State, etc.; No. 16,426. Caldwell v. State, etc.; No. 16,427. Inman v. State, etc.; No. 16,428. Stafford v. State, etc.; No. 16,429. Holcraft v. State, etc.; No. 16,430. Stewart v. State, etc.

By the Court.—The judgment in each of the above entitled cases is affirmed upon the authority of *Racer* v. *State, etc.*, *ante*, p. 393.

Filed April 30, 1892.

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Speer *v.* Speer, 7 Ind. 178, and Thompson *v.* Thompson, 9 Ind. 323, distinguished. *Korrady* v. *Lake Shore, etc., R. W. Co., 261*

Martin *v.* Martin, 118 Ind. 227, distinguished.
Puterbaugh v. *Puterbaugh, 288*

Board, etc., *v.* Barnes, 123 Ind. 403, and Board, etc., *v.* Johnson, 127 Ind. 238, distinguished. *Board, etc.,* v. *Mitchell, 370*

Alvis *v.* Whitney, 43 Ind. 83, distinguished.
Lake Shore, etc., R. W. Co. v. *Smith, 511*

CERTIFICATE.

See Elections, 2.

CHANGE OF VENUE.

1. *Change of.—Setting Aside Judgment.*—Where a suit was begun in the Howard Circuit Court, and on application of the appellants was sent to the Clinton Circuit Court, and from that court, on appellee's application, was sent to the Grant Circuit Court, and after remaining there for nearly three months, the latter court, on its own motion, ordered the case back to the Clinton Circuit Court, a judgment rendered in the Clinton Circuit Court against the appellants should be set aside, the affidavit in support of the motion to set the judgment aside showing that the appellants had no knowledge until long after the judgment had been rendered that the cause had been transferred to the Clinton Circuit Court, and that they had a meritorious defence.
Coleman v. *Floyd, 330*

2. *Same.—Transfer to Another County.—Validity of Transfer.—When Party Can Not Contest.*—Where a party obtains a change of venue from the county, and is instrumental in carrying the case to another county, he can not successfully assert that the case was not properly in the circuit court of the latter county, unless he can make it appear that there was no jurisdiction over the subject resident in that tribunal. *Ib.*

3. *Same.—General Jurisdiction.—How Cause Can be Transferred.*—Where a court has general jurisdiction of the subject and the person, a cause can only pass from that court by a judgment. It can not be arbitrarily transferred to another tribunal. For a discussion of the distinction between jurisdiction of a person and jurisdiction of a particular case, see opinion. *Ib.*

4. *Same.—Failure to Send Cause to Adjoining Circuit.—Jurisdiction.*—From the mere fact that on change of venue the case is not sent to an adjoining circuit as required by section 413, R. S. 1881, it does not follow that the circuit court to which it is sent has no jurisdiction. It can not arbitrarily send the case back after having assumed jurisdiction. *Ib.*

5. *Change of.—Ruling Upon Application for.—Bill of Exceptions.*—No question is presented upon the ruling of the court denying a change of venue when there is no bill of exceptions in the record containing the affidavits, rulings or exceptions. *Holland* v. *State, 568*

CHATTEL MORTGAGE.

Given to Save Surety on Note Harmless.—Right of Payee of Note to Foreclose.—Trustee.—Who May Plead.—Disability of Married Woman.—The owner of personal property mortgaged it to his wife the consideration being that she had become liable to pay certain notes executed by him; and it contained a condition that if he should pay the notes and hold her "harmless and exempt from paying the same, or any part thereof, then" the mortgage to be void, otherwise to remain in force.

Held, that the lien of the mortgage attached to the property in the nature of a trust, so remained until the notes were paid, and that the payee or owner of the notes could maintain an action to foreclose the mortgage.

Held, also, that her coverture could not be set up as a defence by those claiming a lien on said property which was subsequent to the lien of the mortgage, on the ground that there was no consideration for her assuming the payment of the notes for the reason that a married woman could not become surety.

Held, further, that a contract of suretyship by a married woman can only be avoided by her or by those in privity of blood with or in representation of her. *Plaut* v. *Storey*, 46

COLLATERAL ATTACK.

See COUNTY COMMISSIONERS, 5; DAMAGES, 5; INJUNCTION, 1; JUDGMENT, 4.

COMMON CARRIER.

1. *Contract to Furnish Suitable Cars.—Liability for Breach of.—Sufficiency of Complaint.—Measure of Damages.—Demurrer.*—In an action by a quarry company against a railway company for damages for breach of contract to furnish the quarry company with strong and amply sufficient and properly inspected cars for the transportation of the product of the quarry, the complaint alleged that the railway company had in its service a car inspector, whose duty it was to inspect the cars that were to be furnished the appellant; that a defective car was delivered to the plaintiff by the railway company; that its defective condition might have been discovered by the railway company on proper inspection, but that it carelessly and negligently failed to inspect the car, and knowingly delivered it to the plaintiff without inspection; that the plaintiff, relying upon the fact that the railway company had performed its duty to inspect, received from it said car, believing it to be safe and secure, the defect being hidden and unknown to the plaintiff; that the car, by reason of its defective condition and without any default on the part of the plaintiff, broke loose and ran down a grade, killing one of the plaintiff's employees.

Held, that the complaint stated a good cause of action against the railway company for breach of duty.

Held, also, that as it can not be said that merely nominal damages are recoverable, the judgment sustaining the demurrer to the complaint must be reversed. *Hoosier Stone Co.* v. *Louisville, etc., R. W. Co.*, 575

2. *Same.—Estoppel.—Contributory Negligence.*—In such an action the defendant can not successfully demur to the complaint on the ground that it does not show that the employee who was killed was free from contributory negligence, when the complaint avers that the railway company, through its general counsel and solicitor, represented the administrator of the deceased employee in an action brought by him against the quarry company for damages resulting from the death of his intestate, and that the railway company, after receiving notice from the quarry company of the pendency of the action, and that it would hold the railway company liable for all damages recovered, refused to defend said action, and the quarry company defended it at its own expense, and judgment was rendered against it. The conduct of the railway company in said behalf worked an estoppel, as a recovery could not have been had by the administrator if his intestate had been guilty of contributory negligence. *Ib.*

3. *Same.—Judgment in Former Action.—When Inoperative as an Estoppel.*—The judgment recovered by the administrator against the quarry company did not preclude the latter from maintaining an action against the railway company for a breach of its duty as a carrier.

The former action was for an injury resulting from a breach of duty owing by the quarry company to an employee, while the present action is brought for the breach of duty owing by a carrier to one for whom it had undertaken to carry goods or property. Further than this the railway company was not a party to the action in which the judgment was rendered, nor in privity with any of the parties in such a sense as to make the judgment available as an estoppel to the injury of the plaintiff. *Ib.*

CONDITION PRECEDENT.

See CONTRACT, 6.

CONSIDERATION.

See PROMISSORY NOTE, 2; REAL ESTATE, 5, 6.

CONSTITUTIONAL LAW.

See TAX COMMISSIONERS.

1. *Penalty for Obstruction of Highway, Validity of.*—A statute providing a penalty for the obstruction of a public highway, and also providing that the penalty shall be payable to the trustee of the township for the benefit of the public highways of the township, is not invalid because such penalty is not payable to the common school fund of the State. *Toledo, etc., R. R. Co.* v. *Stephenson, 203*

2. *Statute Requiring Trustees to be Residents of State Invalid.*—The statute (section 2988, R. S. 1881) requiring a trustee of any person, association or corporation to be a *bona fide* resident of the State of Indiana is unconstitutional, being in conflict with article 4, section 2, and the Fourteenth Amendment of the Constitution of the United States. *Roby* v. *Smith, 342*

3. *Police Power.—State Depriving Itself of Right to Exercise.*—A State can not deprive itself of the right to exercise the police power, and such an attempt, if made, is only a mere license, which may be revoked. *Cleveland, etc., R. W. Co.* v. *Harrington, 426*

4. *General Law, What is.—Uniformity of Operation.*—A law which applies generally to a particular class of cases is not a local or special law. The Constitution does not require that the operation of a law shall be uniform, other than that the operation shall be the same in all parts of the State under the same circumstances. *Consumers', etc., Co.* v. *Harless, 446*

5. *Independence of the Three Departments of State.*—The power of the three great departments of the State are not merely equal, but they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. *Langenberg* v. *Decker, 471*

CONTEMPT.

See TAX COMMISSIONERS.

1. *Newspaper Publication.—Reflection Upon Court or Grand Jury.*—The publication of an article reflecting upon the grand jury, tending to bring them into disrepute, and to embarrass and interrupt a legitimate investigation by them as to the commission of a crime at any time during their session, is subject to the cognizance of the court, and the author thereof is liable for contempt. *Fishback* v. *State, 304*

2. *Same.—Answer Purging of.—Language not per se Libellous.*—When the language used in a newspaper article is not *per se* libellous, and only becomes so by the use of innuendoes, and is fairly susceptible of an innocent meaning, in so far as any reflection upon the court is concerned, and the defendant answers under oath that he used it in a sense not libellous, and declares he intended no imputation upon the

court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive. The disclaimer also applies to the grand jury. The judge himself can not assert facts existing in his own mind as against the answer. If he believes the facts stated are untrue, that issue may be tried, and the judge can testify as to the facts within his knowledge in a proper prosecution. *Ib.*

3. *Same.—Language per se Libellous.—Insufficiency of Answer.*—If a newspaper article is *per se* libellous, making a direct charge aganst the court or jury, admitting of but one fair and reasonable construction, and requiring no innuendo to apply its meaning to the court, the publisher of the article can not escape liability for contempt by admitting the publication of the article, but denying that he intended the plain and unmistakable meaning which the language used conveys. *Ib.*

4. *Same.—What Necessary to Constitute.*—To constitute a contempt there must be an act coupled with an intended disrespect to or defiance of the court. *Ib.*

5. *Power to Punish for, Who May Exercise.*—Only the courts and the General Assembly can punish for contempt; and the power to do so can not be conferred upon any other official or board of officials.
Langenburg v. *Decker*, 471

CONTEST OF ELECTIONS.

See ELECTIONS, 1.

CONTINUANCE.

Absent Witness.—Diligence Must be Shown by Party Applying—An affidavit which shows that the attorney of the party applying for a continuance, because of absent witnesses, has been diligent to secure their attendance, is not sufficient, unless it also shows that the party himself has been diligent to procure their attendance; and this is true where the affidavit for such continuance is made by the attorney.
Toledo, etc., R. R. Co. v. *Stephenson*, 203

CONTRACT.

1. *Extension of Time.—Forbearance to Sue.*—An agreement to extend the time of payment of a debt for a limited period of time, even if founded upon a sufficient consideration, is, in substance, an agreement not to sue within that time, and can not be pleaded in bar of an action brought within that time. The only remedy for the violation of such an agreement is an action for damages. *Ayers* v. *Hamilton*, 98

2. *Contemporaneous Parol Contract Modifying Written Contract.*—If a contract is reduced to writing, it can not be shown that there was a contemporaneous parol contract modifying the written contract.
Stevens v. *Flannagan*, 122

3. *Same.—Beneficiary.—Contract not Delivered to.—Right to Maintain Action on.*—A beneficiary of a contract may demand its performance and enforce it by suit without a delivery of such contract to him. *Ib.*

4. *Interpretation of.*—When the contract and the terms of the entire instrument taken together show conclusively that the wrong word has been used through inadvertence, it is the duty of the court to interpret the contract according to the manifest intention of the parties, and to instruct the jury accordingly. *Russell* v. *Merrifield*, 148

5. *Independent Contractor.—Negligence.*—Where one lets a contract to another to do a particular work, reserving to himself no control over such work except the right to require it to conform to a particular

standard when completed, he is not liable for the negligence of the party to whom the contract is left. *New Albany, etc., Mill* v. *Cooper*, 363

6. *Subscription to Secure Removal of Manufactory.—Conditions Precedent.—Recovery of Money Paid—Performance of Agreement.*—Citizens of Plymouth were negotiating with an electric light company to move its business of manufacturing incandescent lights to such city, and the company wrote that it was "not expedient to" do so, but added: "We, however, feel that we are under obligations to recognize your efforts, and we will, however, move all the manufactory of the Jenney Arc Lamps and Dynamos from Fort Wayne to Plymouth on condition of you giving our company ten acres of ground suitably located for our works, and $15,000 in cash, to be invested in buildings and machinery on said grounds, and will take $115,000 of the capital stock of our company," paying therefor in the following manner: 25 per cent. cash on a date given, and the remainder in three equal installments on dates named. Three days after, the agents of such citizens called on the company and asked for an invoice of its property, and to investigate its financial condition, but the officers thereof said it was impracticable to do so then, owing to the state of their business, and in lieu thereof the company executed the following writing: "We will guarantee that our invoice will show a surplus of $300,000 of good assets over and above our liabilities, counting patents and good will at $100,000, on April 1, 1888. This guarantee is made because the company has not invoiced this year, and to satisfy you that we will not declare any dividend that will impair the assets below the sum as shown in the invoice, of which we give you a copy, dated January, 1887, and that we will in addition change our letter of March 24 [quoted above] to conform to your subscription to stock, $115,000 and bonus of $15,000, which is that the $15,000 is to be paid within ten days, and 25 per cent. of stock so soon as we commence moving machinery to Plymouth, and 25 per cent. every three months thereafter until paid." The propositions in these two letters were accepted by the citizens, and the company was informed that they had "raised the proper amounts," and that they would fully comply with the terms of the propositions. Subsequently the plaintiffs, who were citizens of Plymouth, subscribed, for the purpose of inducing the company to bring its "factory" to the city, fifteen thousand dollars; they and others also subscribed for stock of the company amounting to $115,000, the money to be paid in installments of 25 per cent. every three months, "the first installment to be paid when said company shall commence removing the machinery of their arc light manufacturing plant to the city of Plymouth." Both of these subscriptions were turned over and accepted by the company. A tract of ten acres was also conveyed to it, upon which it erected a shop at a cost of $11,000, and placed a boiler, or engine, and some other machinery, therein, and then called upon the stockholders for the payment of 25 per cent. of their subscriptions. Payment was refused, and suit brought to recover back the $15,000, on the ground that the company had not complied with its contract.

Held, that the persons who subscribed the $15,000, the persons who subscribed for the stock, and the donators of the land were all acting together in a common enterprise, and their promise and acts together constituted the consideration for the promise to remove the manufacture to Plymouth.

Held, that construing all the writings together the failure of the company to make the invoice was a breach of contract.

Held, that the averment that the company had never "moved all or any part of the manufacture of Jenney Arc Lamps and Dynamos from

Fort Wayne to said city of Plymouth, nor did said company even begin the removal thereof," was sufficient to show a non-compliance with the contract on the part of the company, and to excuse the payment of the subscriptions or the tender of the amount thereof.

Held, that the machinery referred to was the machinery of the manufactory at Fort Wayne.

Held, that the condition on the part of the company could only be complied with by a *bona fide* commencement of the removal of the machinery actually belonging to and used in its business at Fort Wayne; and until a commencement, or a beginning, of this character was made, there was nothing due on the stock subscriptions.

Held, that the erection of the building was not in any sense or degree the rendition by the company of any part of the consideration.

Held, further, that the invoice was to be furnished within a reasonable time; and to show what was such a reasonable time it was competent to show what the directors of the company said, when they gave the guaranty, about the time when it would be practicable and convenient for them to make the invoice.

Ft. Wayne, etc., Co. v. *Miller*, 499

CONTRIBUTORY NEGLIGENCE.

See Common Carrier, 2; Master and Servant, 1, 4; Negligence, 3, 14, 15, 17 to 19; Pleading, 5.

CONVERSION.

See Township Trustee, 2.

CONVEYANCE.

See Real Estate, 1, 3, 5.

CORPORATION.

See Taxes, 3.

COSTS.

1. *Reversal in Part.—Principal and Surety.—Action to Set Aside Fraudulent Conveyance.*—In an action on a guardian's bond, and to set aside a fraudulent conveyance by the surety, where a demurrer had been erroneously overruled as to the surety and his wife, the court reversed the case as to the surety and his wife and adjudged the costs against the relator and in favor of the principal defendant and his surety back to the return of the verdict, the other costs in favor of the relator, and adjudged all costs in favor of the wife. *Line* v. *State, ex rel.*, 468

2. *Bond for.*—In law, *prima facie*, the domicil of the husband is the domicil of the wife, and when the husband makes a motion to require the wife to give a non-resident's bond, and makes no proof of her non-residence, but relies upon the averments of the complaint to show that fact, the husband being a resident of this State, the wife could not be required to give a bond for costs in an action against her husband.

Curtis v. *Curtis*, 489

COUNTY.

1. *Liability to Workmen Tearing Down Bridge.—Liable Only to a Traveller.*—A county is not liable for any injury to a servant while engaged in tearing down one of its bridges, although he works under the immediate charge or control of its agent, who is known to the board of commissioners to be incompetent. For an injury occasioned by an insufficient bridge, it is liable only to a traveller.

Smith v. *Board, etc.*, 116

2. *Unhealthy Condition of Jail.—Action for Damages.*—A county can not be held liable in an action for damages resulting from a failure of the

board of county commissioners to keep the jail in a healthy and inhabitable condition. *Morris* v. *Board, etc.*, 285

COUNTY COMMISSIONERS.

See GRAVEL ROAD, 1, 3, 5, 7 to 9; MANDAMUS, 1; RAILROAD, 27; SCHOOL TRUSTEE, 5.

1. *Allowances by.*—Construing the acts of 1879 and 1883 together, concerning allowances by boards of county commissioners, the plain conclusion required is that where there is an "indispensable public necessity" there is authority of law for making a contract with a county officer. *Board, etc.*, v. *Mitchell*, 370

2. *Same.—Review of Decision.—How Effected.*—In order to review the decision of a board of county commissioners as to the existence of an "indispensable public necessity," there must be a pleading properly alleging facts showing that the finding of the existence of a public necessity was wrong. *Ib.*

3. *Same.—Contract with Officer of County.—Validity of.*—Where a board of county commissioners contracted with the county clerk at a stipulated price (the record showing "an indispensable necessity" for so doing) to index and re-arrange certain papers and files in his office, he may recover against the county on the contract. The claim is not for extra compensation, nor for official services nor for added official duties, but solely and exclusively for compensation due under a special contract, which the board had the same right to make with the county clerk as with a private individual. *Ib.*

4. *Same.—Practice.—Contract Spread of Record.—Admission Implying.*—Where the record contains an express admission that a contract was entered into between the parties as alleged in the complaint, the admission implies that there was a contract properly spread of record, and makes unavailing the objection that it is not shown that the contract was spread upon the record of the board of county commissioners as the statute requires. *Ib.*

5. *Change of Township Boundaries.—Collateral Attack.*—The board of commissioners of a county are authorized to make such alteration in the boundaries of townships as they may deem proper, and their action in doing so, unless shown to be absolutely void, can not be attacked collaterally. *Lake Shore, etc., R. W. Co.* v. *Smith*, 512

6. *Appeal from.—What Questions can be Considered.—Jurisdiction.*—Upon appeal from the board of commissioners to the circuit court no questions can be considered except such as were presented and involved in the commissioners' court, save the question of jurisdiction. *Dayton G. R. Co.* v. *Board, etc.*, 584

COUNTY SUPERINTENDENT.

See SCHOOLS, 2.

1. *Election of.—Township Trustees.—Quorum.—Members Present Declining to Vote.*—Where the township trustees of a county, six in number, met on the day appointed by statute for them to do so, to elect a county superintendent, and after perfecting their organization, proceeded to ballot for such officer, and after a number of ballots had been taken, without an election, three of the trustees, after protesting against further balloting, stepped from the part of the room occupied by them and mingled with the spectators, and thereafter another ballot was taken, said withdrawing trustees still remaining in the room but not voting, and the other three trustees cast their votes for the appellee, he was legally elected to the office of county superintendent if the requirements of the law were complied with in other particulars. There was no such absence of the three trustees as can be said to have

broken a quorum. Being present it was their duty to act. The presiding officer had a right to treat them as part of the board, to treat them as present and failing or refusing to vote.
State, ex rel., v. *Vanosdal*, 388

2. *Same.—Election of After Midnight—Validity of.*—Where the township trustees of a county met on the first Monday of June, as required by section 4424, R. S. 1881, to elect a county superintendent, and organized and proceeded to the election, they had the right, and it was their duty to complete the work for which they were convened, and the fact that they were unable to complete their work before the hour of twelve o'clock at night did not invalidate their acts done after that hour. *Ib.*

COVENANT.

See PARTIES, 4.

To Maintain Crossing, Cattle-guards, etc.—Obligation to Perform by Purchaser at Foreclosure Sale.—Right of Way.—Railroad.—A provision in a deed of land to a railroad company for a right of way, requiring the grantee to maintain a fence on each side of said right of way, and to put in and maintain a farm crossing and cattle-guards, is a covenant running with the land. It is binding on the grantee and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed. While equity will apply the mortgage to the after-acquired title, it can only affect such right and such title as the grantee and mortgagor actually acquire. If the title comes to him, as in this case, burdened with covenants, the mortgagee, while availing himself of the security, must take the title as it is, with its burdens. *Lake Erie, etc., R. R. Co.* v. *Priest*, 413

CRIMINAL LAW.

1. *Embezzlement.—Intent to Defraud—Evil Intent.*—To constitute the crime of embezzlement of money there must be, either at the time of receiving the money or at some subsequent time, some element of fraud or evil intention; for if there be no fraudulent purpose or evil intention there is no crime. *Fowler* v. *Wallace*, 347
2. *Same.—Intention to Return Money Taken.*—If there is a wilful and known wrongful taking, use or appropriation of the employer's money by an agent, the criminality of the act is not removed by the intention to make restitution of the money. *Ib.*
3. *Same.—No Intent to Deprive Owner of Money or His Property.*—It is not essential to the crime of embezzlement that at the time the wrongful act is perpetrated there should be an intention to deprive the owner of his property. *Ib.*
4. *Abortion.—Sufficiency of Indictment.—Averment as to Intent.*—In an indictment for criminal abortion, charging that the defendant feloniously, unlawfully and wilfully employed an instrument in and upon the body and womb of a pregnant woman, with intent to produce a miscarriage, etc., the allegation "feloniously and unlawfully" applies to the intent with which the instrument was used, as well as to the use of the instrument itself. *Holland* v. *State*, 568

CUSTOM.

See RAILROAD, 8; SCHOOL TRUSTEE, 4.

DAMAGES.

See EMINENT DOMAIN, 6, 7; PLEADING, 16; QUIETING TITLE, 2; RAILROAD, 15.

1. *Ditch Assessment.—Appeal Bond.—Sufficiency of.*—In an appeal from an assessment made against the land-owners along the main ditch, and also along the south arm thereof for the amount expended for repairs

on the ditch, it is not necessary that the lands assessed from which the appeals are taken should be described in the appeal bonds, the appeals having been taken separately, nor need the bonds state whether the lands were assessed for repairs to the main ditch or to the south arm. It was proper to name the county surveyor as the obligee in the appeal bonds, although the assessments were made by a deputy surveyor. *Stingley* v. *Nichols, Shepard & Co.*, 214

2. *Same.—Right of County to Defend.—Refusal to Permit.—County Surveyor.*—Where appeals are taken from ditch assessments, the county being the party and the only party financially interested in the collection of these assessments, it is proper for the board of county commissioners to employ attorneys to appear and protect the interests of the county in said appeals, and it is error for the court to refuse to permit such attorneys to represent the county surveyor. Where, however, said attorneys did appear for the party who made the assessments, and continued the litigation, the error is not available. *Ib.*

3. *Same.—Burden of Proof.*—In such appeals the burden of proof is upon the county surveyor, and it is not error to require him to open and close the case. *Ib.*

4. *Same.—Board of County Commissioners.—Power to Appoint Deputy Surveyor.—Sufficiency of Appointment.—Collateral Attack.*—The power to appoint a deputy to act in cases wherein the regular surveyor is interested is specially delegated to the board of county commissioners. When they have made such appointment, the presumption exists, at least upon a collateral attack, that the county surveyor was interested in a matter wherein he was required to act, and that the board had knowledge of the fact. It is not necessary to recite the grounds upon which a board of county commissioners proceeds in a matter which is within their jurisdiction. An order of appointment by a board of commissioners which recited that the board appointed "A. R. as deputy surveyor for Fulton county, Indiana, in compliance with section 5952, R. S., 11th specification, section 140, R. S. 1881," was broad enough to include the making of assessments for ditch repairs, and sufficient to withstand a collateral attack. *Ib.*

5. *Judgment.—Collateral Attack.—Demurrer.*—In a suit on a guardian's bond alleging damages because of the negligence of the guardian in the discharge of his duty in instituting and prosecuting a suit against appellant, as next friend and guardian of his ward, in which action appellant was interested and was then a ward of said guardian, the complaint alleged that the guardian failed to employ counsel to defend the rights of said appellant, and that but for said breach of duty and neglect, said appellant would not have been damaged therein, and that the judgment rendered against said appellant, as a result of said breach of duty on the part of said guardian, was erroneous. A demurrer to the complaint was sustained.

Held, that the attack upon the decree being made in a suit upon a guardian's bond is necessarily collateral, and to be successful facts must be pleaded showing that the decree is absolutely void.

Held, also, that as the court rendering the judgment attacked had jurisdiction of the subject-matter and of the parties, and the decree was such as might have been rendered in such a case, the decree is binding upon all the parties to it until set aside by a direct proceeding brought for that purpose.

Held, also, that as against a collateral attack a judgment will be conclusively presumed to be correct, and averments in the complaint that appellant's rights were greater or different from what they were then adjudged to be, must be disregarded as in conflict with the finding and judgment of the court.

Held, also, that in so far as this proceeding is concerned, it will be presumed that, notwithstanding a failure on the part of the guardian in the performance of his duty, she suffered no loss by reason of said neglect, and that the court meted out justice to appellant.

Held, also, that the complaint does not state a good cause of action, and that the demurrer was rightly sustained. *State, ex rel.*, v. *Rogers*, 458

6. *Limit in Suit on Guardian's Bond.*—The amount of recovery in an action on a guardian's bond can not exceed the amount of the penalty designated in the bond. *Line* v. *State, ex rel.*, 468

DECEDENTS' ESTATES.

See VENDOR AND VENDEE, 2.

1. *Sale.—Purchase by Executor's Wife.*—Where two executors offer real estate of the testator for sale at public auction in pursuance of an order of court, the wife of one of the executors may, in good faith, become a purchaser of the real estate at such sale, and derive a valid title to the real estate through such purchase. *Crawford* v. *Gray*, 53

2. *Action by Legatee Concerning Assets of Estate, Can not Maintain.*—A legatee, whether his legacy be specific, general or residuary, has no right, until the estate is settled, without the consent of the executor, to withdraw a portion of the assets of the estate liable for the payment of the debts of the testator, except as provided by statute, and he can maintain no action to recover such assets from a third party. *Holland* v. *Holland*, 196

DEED.

See MORTGAGE, 5.

1. *Sufficiency of Description of Land in Deed or in a Contract for a Deed.*—The description of land in a deed is sufficient if it furnishes the means by which the land can be identified; and for that purpose another instrument referred to in the deed may be considered as a part thereof. That which would be a sufficient description of the land in a deed is sufficient in a contract for a deed. *Stevens* v. *Flannagan*, 122

2. *Same.—Use of Word "Heirs" of Living Person.*—Where the word "heirs" is used in a deed or a contract for the conveyance of land, coupled with other explanatory words showing that it was the intention by the use to designate or describe a class of persons rather than that it should receive its strict, technical interpretation, the courts will give to it a construction conforming to the manifest purpose of the parties. *Ib.*

3. *Same.—Purchase Money to be Paid After Vendor's Death to Vendor's Heirs.—Right of Administrator to.—Interest.*—A contract, followed by proper conveyances, for the sale of land, conditioned that the vendor is to receive back from the vendee a deed conveying to him a life-estate in the land sold, and that the vendee is to pay the purchase-money, in certain instalments, after the death of the vendor, to the vendor's "heirs" (or children), is no part of the assets of the vendor's estate, and his administrators are not entitled to any part of it (unless the estate be insolvent). Such a contract draws interest from the time the payments were to have been made. *Ib.*

4. *Use of Word "Executed."—Delivery.*—The word "executed," in reference to the execution of a deed, implies a delivery. *Smith* v. *James*, 131

5. *To Heirs of Person Living.—Effect of.*—Where a warranty deed was executed to "Sarah A. Tinder and the heirs of Simeon Tinder, by Sarah A. Tinder his wife," both Simeon Tinder and his wife being alive at the time of the execution of the instrument, the deed conveyed the land therein described to Sarah A. Tinder and her children by Simeon Tinder. The word "heirs" in said deed was not used in

its strict legal sense, but in the sense of children, and the conveyance operated to a person named, and a designated class of persons whose identity could be established, and conveyed them equal shares in the land. The deed refers to a class, and not to possible descendants. There is manifested an intention that the land shall pass directly out of the grantor into the designated grantees. The estate, it is obvious, was intended to leave the grantor and vest directly and immediately in the grantees. *Tinder* v. *Tinder*, *381*

6. *Same.—Word "heirs" construed.—Intention of Grantor.*—A conveyance of land describing the grantees as heirs of a person named and still living, is not ineffective on the ground that a person can not have heirs during life, when the language used clearly shows that the word "heirs" was not employed in its strict legal sense, but as meaning children, and that to hold otherwise would result in manifest injustice, and defeat the intention of the grantor. *Ib.*

7. *Same.—Construction of Deed.*—In construing a deed it is the duty of the court to assign to the words of the grantor their fair and reasonable meaning, so that the intention of the grantor may be discovered and carried into effect. *Ib.*

DELIVERY.

See Deed, 4.

DEMURRER.

Order-Book Entry, Varying Contents of.—The order-book entry of the filing of a demurrer can not control the contents of the demurrer. *Holland* v. *Holland*, *196*

DEMURRER TO EVIDENCE.

Practice.—Where there is a demurrer to evidence the court is bound to accept as true all the facts which the evidence tends to prove, and, as against the party demurring, to draw from the evidence all such reasonable inferences as a jury might draw. If there is a conflict in the evidence, then only such evidence as is favorable to the party against whom the demurrer is directed can be considered, and that which is favorable to the demurring party is deemed to be withdrawn. *Chicago, etc., R. R. Co.* v. *Williams*, *30*

DEPOSITION.

Seal of Notary.—Clerk's Certificate.—When a notary public in a foreign State, taking a deposition, omitted his seal from the certificate, but the clerk of the county, by a proper certificate, attested to the official character and signature of the notary, there is no cause for suppressing the deposition. *Curtis* v. *Curtis*, *489*

DESCRIPTION OF LAND.

See Deed, 1; Drainage, 9; Easement; Taxes, 4, 5.

DILIGENCE.

See Continuance.

DISCRETION.

See School Trustee, 3.

DISMISSAL.

See Appeal, 2.

DRAINAGE.

1. *Act of March 9th, 1875.—Lien of Assessment Under.—Priority of Mortgage Lien.*—Under the act of March 9th, 1875 (Acts of 1875, p. 97), an assessment for the construction of a ditch is not a lien upon the land benefited superior to a prior mortgage thereon. The act, indeed, con-

tains no provision making the assessment a lien upon the land benefited. *Pierce* v. *Ætna Life Ins. Co.*, 284

2. *Pleading.—Action to Foreclose Lien.*—In an action to enforce the collection of an assessment levied to pay the cost of constructing a public ditch, an answer is bad which proceeds either upon the theory that the commissioner of drainage had no authority to enforce the assessment because the work was not completed, or because the work had not been done, and would not be done, according to contract. *Racer* v. *State, etc.*, 393

3. *Same.—Drainage Commissioner.—Levying of Assessments.*—The commissioner of drainage under our statutes is authorized to exercise a reasonable discretion in levying assessments to secure in advance money to pay for work in progress, but not completed. *Ib.*

4. *Same.*—The fact that the contract between the drainage commissioner and the party employed to do the work provided that "No part of said work shall be accepted from said Henry C. Paul as completed until all of said ditch down stream therefrom shall have been completed according to said specification," did not prevent the commissioner from levying an assessment before the work was so completed. *Ib.*

5. *Same.—Assessment to Meet Claim when it Matures.*—While the powers of a drainage commissioner are strictly statutory, he has nevertheless a reasonable and limited discretion. In providing in advance the means of paying the contractor when his claim should mature, the commissioner was acting within the scope of his authority, and did not abuse the discretion conferred upon him by statute. *Ib.*

6. *Same.—For what Purposes Assessments May be Made.—Presumption as to.*—An assessment may be made and enforced to pay other expenses than those directly incurred in constructing the ditch. As the commissioner can have no other funds except such as are derived from assessments, it follows that when it becomes necessary and proper under the law to secure funds, he may make an assessment. When the contrary does not appear the courts must assume that there was a valid reason and proper cause for making an assessment. See Elliott's Supp., section 1178. *Ib.*

7. *Same.—Neglect of Duty by Commissioner.—Remedy of Land-Owner.*—It was the duty of the drainage commissioner to compel the performance of the work in substantial compliance with the contract, but his failure to do so would not constitute a defence to a suit to enforce an assessment. The remedy of the land-owner is to make application to the court having control of the work, and whose agent the commissioner is, to compel a performance of duty by the contractor and the commissioner. *Ib.*

8. *Who May Sue on Assessments.*—A commissioner of drainage, in charge of the construction of a ditch, may sue for and collect so much of the assessment made for the construction of such ditch before the same was referred to him as may be necessary to its construction, and he is not restricted to the assessment made by himself. *Smith* v *State, etc.*, 441

9. *Defective Description of Land.—Correction of*—Where the complaint clearly shows the land intended to be benefited, and that the defective description of the land was caused by the mistake of the drainage commissioner, the description may be corrected and the assessment enforced against the land intended. *Luzadder* v. *State, etc.*, 598

EASEMENT.

Pleading.—Description of Land.—Exhibits.—In a suit to establish a right to the easement of a right of way across certain lands, the complaint is defective if it does not contain a description of the land over which

the easement is claimed. Reference can not be had to exhibits filed with the complaint to make good such an omission, such exhibits being in no sense copies of the writing forming the basis of the pleading. *Price* v. *Bayless*, 437

ELECTIONS.

See COUNTY SUPERINTENDENT.

1. *Illegal Voter.—Contest.—Weight of Evidence.*—Where the question involved in a contested election case is one of fact respecting the validity of certain votes cast by persons whose qualifications to vote are assailed, the Supreme Court will not pass upon the weight of the evidence, but will affirm the decision of the lower court. *Hacker* v. *Conrad*, 444

2. *Failure to Make Certificate.—Presumption as to Public Officer.*—In an action against an inspector of an election board to compel him to make out and file with the clerk of the court the certificate provided for by section 3309, R. S. 1881, it must be presumed, in the absence of a showing to the contrary, that he and the judge of the election did their duty and that such return was made. Public officers are presumed to have done their duty until the contrary is shown. *Enos* v. *State, ex rel.*, 560

3. *Same.—Mandate.*—Upon the failure and refusal of the inspector to make the necessary return, mandate was the proper remedy to compel him to do so. *Ib.*

4. *Same.—Mode of.—Statute as to Directory.*—Statutes regulating the mere mode of conducting an election are directory, and a departure from such mode will not generally defeat the successful candidate. *Ib.*

EMBEZZLEMENT.

See CRIMINAL LAW, 1 to 3.

EMINENT DOMAIN.

1. *Scope of Power.—Definition.*—The power to exercise the right of eminent domain embraces all cases where, by the authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular case, either by the State, in its sovereign capacity, or by a corporation, public or private, or by a private citizen to whom such right has been granted by the State. *Consumers', etc., Co.* v. *Harless*, 446

2. *Same.—Limitations Upon Power of.—Tender.*—The right of eminent domain is limited only by the Constitution; and the only limitation in this State is that no man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered. *Ib.*

3. *Same.—When May be Exercised.—Supervisory Power of Courts.*—The right of eminent domain is to be exercised only where public necessity or convenience requires it; but where such necessity or convenience is declared by the representative of the sovereign—the Legislature—courts can not question the wisdom of such declaration. *Ib.*

4. *Same.—Time, Manner and Occasion of Exercise of.*—The time, manner and occasion of the exercise of the right of eminent domain are wholly in the control and discretion of the Legislature except as it is restrained by the Constitution of the State. *Ib.*

5. *Same.—To Whom Right is Granted.*—The exercise of the power of eminent domain being an attribute of sovereignty, the sovereign may grant it to whomsoever it may think proper, and deny it to all others. *Ib.*

6. *Same.—Payment of Damages on Appeal.—Entry on Land Condemned Pend-*

ing Appeal.—Validity of Statute.—A statute allowing an entry upon the land pending appeal from the assessment of damages, on payment to the clerk of the court of the amount of the damage assessed for the benefit of the land-owner, is valid, such payment being equivalent to a tender; but a statute directing the clerk to hold such money until the case on appeal is determined is unconstitutional. *Ib.*

7. *Same—Payment of Damages Under Protest.*—A payment under protest does not render the payment or a tender invalid, the protest being a nullity. *Ib.*

EQUITY.

See Stay of Proceedings.

ESTOPPEL.

See Administrator's Sale, 2; Common Carrier, 2, 3; Gravel Road, 4; Married Woman, 2, 4; Mortgage, 3, 4.

1. *Third Person Relying Upon Correspondence not Addressed to Him.*—A. wrote to B., who had executed a note payable in bank, asking him "if the note was all right," and if it would "be paid at maturity?" B. replied on the back of the letter that "the note referred to is all right, and will be paid when due." The letter came into the possession of C., who purchased the note before it was due, relying upon the correspondence, and became assignee thereof.

Held, that B. was not estopped to set up any defence against said note that existed at the time of the correspondence as against C., the purchaser. *Brickley* v. *Edwards*, 3

2. *Same.—Special and General Admissions or Declarations.*—Admissions or declarations which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced, whether the admissions or declarations are made in express language to the person himself, or are made in general terms, or may be implied from the open and general conduct of the party. Open and general statements of a party may be considered as addressed to everyone who may have occasion to act upon them. *Ib.*

EVIDENCE.

See Bill of Exceptions, 4 to 8; Fraud, 6; Marriage Contract, 1; Negligence, 4, 6, 10, 20; Practice, 6, 7, 15, 31; Township Trustee, 2.

1. *When Record of Instrument may be Used.*—The record of an instrument is effective for evidence only when such record is made by the proper officer and in the mode prescribed by law. *Adams* v. *Buhler*, 66

2. *Conflict of.*—See opinion. *Sinn* v. *King*, 183

3. *Bill of Evidence—Use of to Prove Testimony of a Deceased Witness at Former Trial.*—A witness' testimony incorporated in a bill of exceptions for the purpose of an appeal is not admissible evidence on a second trial after the case has been reversed and the witness is dead, unless it is first shown that the testimony of such witness therein contained is a true statement of his evidence. *Fisher* v. *Fisher*, 462

EXCESSIVE DAMAGES.

See Malicious Prosecution, 1.

EXHIBITS.

See Easement.

FORECLOSURE.

See Chattel Mortgage; Mortgage, 3; Parties, 1, 3.

FORFEITURE.

See LIFE INSURANCE, 2.

FORMER ADJUDICATION.

All Defences Must be Plead in Foreclosure Proceedings.—In a foreclosure proceeding the defendant must set up all defences he is entitled to or he will be barred. *Miller* v. *Hardy, 13*

FRAUD.

See ADMINISTRATOR'S SALE, 4; JUDGMENT, 2.

1. *Rescission of Conveyance.—Value of Land Exchanged.*—In an action to rescind a conveyance of land procured by the fraudulent representations of the defendant, it is not necessary to state the value of the land conveyed, though such a statement is proper. *Ross* v. *Hobson, 166*
2. *Same.—Allegation of Reliance on Fraudulent Representations.*—An allegation that the plaintiff relied upon the representations of the defendant and was thereby deceived is sufficient to withstand a demurrer, without an allegation that the plaintiff had no information concerning them. *Ib.*
3. *Same.—Relying on Statements.—When Party May.*—A party may rely upon the statements made to him by the defendant when he is ignorant of their untruthfulness and the subject-matter is not in the vicinity of the place of negotiation. *Ib.*
4. *Same.—Parties.—Person Holding Title to Land.*—A person to whom land is conveyed, in an action for a rescission for fraud, is a proper party defendant, though he had no knowledge of the fraud. *Ib.*
5. *Same.—Death of Defendant.—Substituting Administrator.*—If a defendant, who is a party to a fraudulent transaction, die pending suit for a rescission, his administrator may be substituted. *Ib.*
6. *Same.—Evidence.—Admissions.*—The admissions of a defendant, who furnishes the consideration to secure a conveyance of land executed by the plaintiff, and who is the real party in interest, though the conveyance was made to a co-defendant, are admissible, in an action to rescind the conveyance for fraud. *Ib.*

FRAUDULENT CONVEYANCE.

1. *Sufficiency of Complaint.—No Property Subject to Execution.*—In an action to set aside a fraudulent conveyance it must be alleged in the complaint that at the time of the conveyance, as well as at the time the action was commenced, the defendant, or grantor, had no property subject to execution. *Line* v. *State, ex rel., 468*
2. *Special Finding.—Silence of as to Other Property.*—Where, in a suit to set aside an alleged fraudulent conveyance of land, the special finding of facts failed to disclose that the grantor had no property other than the said land out of which the debt sued for might be made either at the time of the conveyance or from that time to the time suit was brought, a judgment setting aside the conveyance was erroneous. The finding being silent upon these material facts, it stands as if such facts were not proven. *Hartlepp* v. *Whitely, Fasler & Kelly Co., 543*

FRAUDULENT REPRESENTATIONS.

See FRAUD, 2, 3.

GENERAL ASSEMBLY.

Delegation of Power.—The General Assembly can not delegate its law-making power to any person or body. *Langenberg* v. *Decker, 471*

GRAVEL ROAD.

See MANDAMUS.

1. *Board of County Commissioners.—Appeal to Circuit Court.*—In the matter of the establishment of a free gravel road, an appeal can only be taken to the circuit court from a final order of the board of county commissioners. *Wilson* v. *McClain*, 335

2. *Estimate of Engineer.*—The estimate of the engineer on a gravel road is *prima facie* correct, and the burden is on the person attacking it to show fraud or mistake. Such an estimate is not conclusive, and can not be so made by agreement of the parties in advance. *McCoy* v. *Able*, 417

3. *Same.—Contract.—Conclusiveness of Action of Board of Commissioners.—Collateral Attack.*—As to the nature of the contract and like matters, the decision of the board of county commissioners is conclusive as to all persons who come in after the work has been done on the contract to the satisfaction of such board and the engineer, and seek to defeat a recovery by the contractor. Such persons can not go behind the contract, for that is a collateral attack. *Ib.*

4. *Same.—Estoppel.—Standing By.*—Property-owners who stand by inactive and passive until after the work is done can not come in and defeat a recovery by the contractor for the value of his work and materials furnished without compensation. *Ib.*

5. *Remonstrance Against Purchase of.—Order of County Commissioners Sustaining.—Appeal from.*—Where the board of county commissioners, after the preliminary steps had been taken, looking to the purchase of a gravel road, sustained a remonstrance filed before it, against completing the purchase and entered an order to that effect, and an appeal was taken from such order to the circuit court by the company, the court did not err in overruling a motion filed by the appellant for an order on the board of commissioners to issue the bonds of the county to it in payment for its toll road. The remonstrance set forth that the appellant had no title to a portion of the road which had been appraised, and the issue thus tendered remained untried and undetermined. *Dayton G. R. Co.* v. *Board, etc.*, 584

6. *Same.—Description of Road in Petition.—Sufficiency of.*—A petition filed with the board of county commissioners for an election on the question of purchasing a gravel road, need only contain such a description of the road as will enable the surveyors and viewers to find and identify the road which is to be made the subject of purchase. *Ib.*

7. *Same.—Order of County Commissioners.—Right of Company to Appeal.*—The gravel road company, though not a party of record to the proceedings before the board of commissioners, had such an interest in the matter involved as to authorize it to prosecute an appeal to the circuit court. *Ib.*

8. *Same.—Refusal to Purchase.—Final Judgment of County Commissioners.—Where Appeal from Lies.*—The final judgment of the board of commissioners refusing to purchase the gravel road involved judicial action from which an appeal would lie, and the only remedy to which the appellant was entitled was that of an appeal to the circuit court. *Ib.*

9. *Same.—Sufficiency of Petition.—Judgment of County Commissioners Upon.*—Where the board of commissioners ordered an election to pass upon the question of the purchase of a gravel road, it necessarily passed upon the sufficiency of the petition requesting such an election, and having the right to determine whether or not it would proceed on the petition, and having determined that it would proceed, its judgment was not void. *Ib.*

GUARDIAN'S BOND.

See DAMAGES, 6.

HABEAS CORPUS.

For sufficiency of petition see opinion. *Curtis v. Curtis, 489*

HARMLESS ERROR.

See PRACTICE, 22, 24.

HUSBAND AND WIFE.

See MORTGAGE, 2.

1. *Tenants by Entireties.—Individual Debt of the Husband.—Suretyship.*—Where land is owned by husband and wife as tenants by the entireties, and the husband and wife sign a note and execute a mortgage on said land to secure the individual debt of the husband, the wife is only a surety, and the mortgage is void. *Wilson v. Logue, 191*
2. *Same.—Wife's Suretyship.—Evidence Tending to Show.*—Where there is evidence tending to show that the note and mortgage in suit were executed to secure a loan made by the plaintiff to the husband, that the money was intended and was in fact used by the husband to pay his individual debts, and that the plaintiff knew at the time the loan was made that the money was borrowed for the use of the husband, the finding of the trial court that the debt evidenced by said note and mortgage was the separate debt of the husband, and that the wife was only surety, will not be disturbed. *Ib.*
3. *Same.—Mechanic's Lien.—Material Purchased by Husband.—When Binding Upon Wife.—Recording Lien in Wrong Book.*—Where land is owned by husband and wife as tenants by the entireties, and the husband, with the knowledge of his wife and without objection on her part, purchases material to replace a barn on said premises destroyed by fire and the wife was present when the material was delivered and used in the construction of the building, and made no objection, the party furnishing the material may acquire a lien against said property by filing a notice as required by law of his intention to hold a lien. The fact that the recorder recorded the notice in the wrong book does not vitiate the notice. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 4.

INFANT.

See MASTER AND SERVANT, 1 to 3; NEGLIGENCE, 19.

INJUNCTION.

See REAL ESTATE, 8; SCHOOLS, 1, 2; SURFACE WATER, 1; TAXES, 1, 7.

1. *Decree without Bond Being Filed.—Collateral Attack Upon.*—A decree granting an injunction without a bond being filed is at most only erroneous, and can not be collaterally attacked. *Lewis v. Rowland, 103*
2. *Natural Gas.—Sinking Well.—Use of Explosives.—Adjoining Land-Owner.*—A land-owner has the legal right to sink a well on his own land, and draw therefrom all the gas that may naturally flow to it, although by so doing he may diminish the supply of an adjoining land-owner, and an injunction will not lie to prevent the use of an explosive in "shooting" a well on the ground that it will increase the flow of gas to the injury of an adjoining land-owner. *People's Gas Co. v. Tyner, 277*
3. *Same.*—If parties sink a gas well in the center of a thickly populated city where they can not collect the necessary quantity of nitro-glycerine to "shoot" it, without endangering the property and lives of

those who have no connection with their operations, they must be content with such flow of gas as can be obtained without such "shooting," and an injunction will lie against them to prevent the accumulation or use of said explosive. *Ib.*

4. *Same.—Act Complained of a Crime.*—The application for such an injunction can not be defeated, because the accumulation of nitro-glycerine within the corporate limits of a town or city is a crime. A private citizen may maintain an action for a public wrong, if he suffers an injury peculiar to himself, and not sustained by the general public. *Ib.*

5. *Same.—Temporary.—What Sufficient to Authorize*—To authorize a court to grant a temporary injunction it is not necessary that a case should be made that would entitle the plaintiff to relief at all events at the hearing. It is sufficient if the court find upon the pleadings and evidence a case which makes the transaction a proper subject for investigation in a court of equity. *Ib.*

6. *Private Corporation.—Wrongful Use of Wharf by.—Common Council.*—Where a corporation for purely private purposes has entered upon a strip of land used for wharf purposes, and has begun the construction of a log-way and raised platform thereon, and threatens to use a steam engine in the prosecution of its business on said wharf, one who lives in the immediate vicinity of the wharf may enjoin such a use of the wharf, his complaint showing injury to the use and enjoyment of his dwelling-house therefrom, and consequent depreciation in its value, and the interference of its comfortable enjoyment by dust, smoke and offensive odors. The common council of a city can not authorize such an obstruction of the wharf. *Adams v. Ohio Falls, etc., Co.*, 375

7. *Same.—Interference with Comfortable Enjoyment of Dwelling.*—It is not necessary to a right of action by the plaintiff that his dwelling-house will be injured by the proposed use of the wharf, but if its comfortable enjoyment will be essentially interfered with by dust, smoke and offensive odors, relief by injunction will be awarded. *Ib.*

8. *Same.—Right in Common with Public.—Deprivation of.*—The plaintiff in such a case has no right of action on account of the deprivation of the right which he in common with the general public has to use and drive over that part of the wharf occupied by the obstruction. *Ib.*

9. *Same.—Injury as Tax-Payer.—When Complaint Fails to Show.*—Where it does not appear in the complaint that plaintiff's taxation would be increased either directly or indirectly by the alleged wrongful use and obstruction of the wharf, there is nothing to show that he will suffer injury as a taxpayer on that account. *Ib.*

10. *Natural Gas.—"Shooting" Well.—Use of Explosives.*—An injunction will lie to prevent the "shooting" of a gas well and the accumulation of nitro-glycerine for that purpose, when it will endanger the dwelling-house of the plaintiff, and the lives of himself and family. *Tyner v. People's Gas Co.*, 408

11. *Same.—Increasing Flow of Gas.—Adjoining Land-Owner.*—A party has the right to explode nitro-glycerine in his well for the purpose of increasing the flow of gas, and an injunction will not lie to prevent his doing so, on the ground that thereby gas will be drawn off from the plaintiff's land into the defendant's well. *Ib.*

12. *Restraining Order Issued by Judge Absent from State.*—A judge of this State can not sit in chambers in the State of Michigan, and issue a valid restraining order. Where an appeal, however, was not taken until after a trial of the cause on its merits, and a final judgment in the appellee's favor which vacated the temporary injunction, the

error, though properly saved by the appellant, was not an available error. *Price* v. *Bayless*, 437

INSANITY.

See WILL, 1, 2.

INSTRUCTIONS TO JURY.

See JURY, 2, MALICIOUS PROSECUTION, 3; MASTER AND SERVANT, 8; NEGLIGENCE, 7; PRACTICE, 12, 29, 30; RAILROAD, 9.

1. *Advocating a Compromise Verdict.*—A clause in an instruction is erroneous which states to the jury, after it has been deliberating upon its verdict some time, that "The law which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and fair concessions." The law does not expect any compromise on the part of jurors. It expects every juror to exercise his individual judgment, and that when a verdict is agreed to it will be the verdict of each individual juror. *Richardson* v. *Coleman*, 210

2. *Must be Considered Together.*—Instructions given to a jury must be considered as a whole. If when taken together they fairly and correctly state the law, the cause will not be reversed, even if some of the instructions, considered alone, might seem incorrect. *Evansville, etc., R. R. Co.* v. *Talbot*, 221

3. *When Court Should not Direct Verdict.*—Where there is evidence tending to support the plaintiff on all material questions, it is proper for the court to refuse to instruct the jury to return a verdict in favor of the defendant. *Pennsylvania Co.* v. *McCormack*, 251

4. *Same.—Correctness of.—See Opinion.*—For correctness of instructions on some of the more material points involved in the case, see latter part of opinion. *Ib.*

5. *How Considered when Evidence not in Record.*—When the evidence is not in the record, instructions given by the court can not be regarded as erroneous if they can be considered as correct upon any state of facts admissible under the issues, and instructions requested and refused will be presumed to have been refused because not applicable to the facts of the case. *Holland* v. *State*, 568

6. *Same.—Evidence Concerning Good Character.—Criminal Prosecution.*—Instructions to the jury in a criminal prosecution are erroneous which declare that if the jury find from the evidence, "independent of the evidence of good character," that there is a reasonable doubt of guilt then they should acquit, but that they must convict if they find, independent of the evidence of good character, that he committed the crime. The effect of these instructions was to deprive the accused of the benefit of evidence of good character, which they assume had been given. Evidence of good character is to be considered in connection with other evidence upon the question of guilt or innocence, and it is not, as these instructions assert, to be considered apart from the other evidence. *Ib.*

INSURANCE.

See LIFE INSURANCE.

Loss by Fire.—Special Finding.—Notice of Loss.—Proof of Ownership.—In an action on a policy of fire insurance providing that in case of loss or damage the assured shall forthwith give notice of said loss in writing to the company at its Chicago office, the special finding of the jury that the local agent of the company immediately notified the company at its Chicago office of the loss and the probable amount of damage, and that the company sent its adjuster to estimate the loss, etc., shows a substantial compliance with said provision. While the finding does not state that the notice given was in writing, the fair inference is

that it was in writing, for it states that the agent sent to the defendant notice of said fire, that the notice gave the number of the policy, etc., and the appellant acted on the notice. The finding of the jury that the policy sued on was issued by the company to the plaintiff (it being stated in the policy that he was the owner of the property), sufficiently shows that the property destroyed was the property of the plaintiff. *Phœnix Ins. Co. v. Perry*, 572

INTENT.

See CRIMINAL LAW, 3, 4; DEED, 6.

INTEREST.

See TAXES, 6.

INTERROGATORIES TO JURY.

See PRACTICE, 13.

1. *General Verdict.—What are Statements of Fact.*—Where the facts stated in an answer to an interrogatory are such as to preclude a recovery, the court must so adjudge, although answers upon other points may be favorable to the party who relies upon the general verdict. The statement that a person saw an approaching engine forty or fifty feet from him before he attempted to cross a railroad is the statement of a fact, and so is the statement that he attempted to cross and was struck by the locomotive. *Korrady v. Lake Shore, etc., R. W. Co.*, 261
2. *Same.—Asking for General Conclusion.—Impropriety of.*—It is not error for the court to decline to permit an interrogatory to go to the jury which asks for a general conclusion, intermixing matters of fact with matters of law.

JAIL.

See COUNTY, 2.

JUDGMENT.

See DAMAGES, 5; JURISDICTION, 1.

1. *Void and Voidable.—When is.*—A judgment of a court of competent jurisdiction is not void unless the thing making it so is apparent upon the face of the record. If the infirmity do not so appear, the judgment may be voidable, but it is not void. *Palmerton v. Hoop*, 23
2. *Same.—Fraud.—Judgment Obtained by, Binding on Parties.*—A judgment obtained by fraud is binding on the parties until set aside in some proceeding instituted for that purpose. *Ib.*
3. *Same.—Death of Defendant Before Judgment Rendered.*—If a defendant has been served with process and then dies, a judgment thereafter rendered against him is not void nor open to collateral attack. *Ib.*
4. *What is a Collateral Attack Upon.*—Any attack upon a judgment for want of jurisdiction in the court which rendered it, predicated upon matter *dehors* the record, is a collateral attack. *Cully v. Shirk*, 76
5. *Motion in Arrest.*—Motions in arrest of judgment, for defects in a complaint, reach such defects only as are not cured by the finding of the court or the verdict of the jury. *Powell v. Bennett*, 465

JUDICIAL KNOWLEDGE.

See PLEADING, 10.

JURISDICTION.

See APPELLATE COURT; CHANGE OF VENUE, 3, 4; COUNTY COMMISSIONERS, 6; PRACTICE, 35.

1. *Action to Set Aside Judgment.—When Does not Lie.*—A defendant can not maintain a separate and independent action to set aside a judgment, on the ground that it was taken against him by default and

without notice, where the return of the sheriff to the summons shows that he was served by copy thereof left at his "last and usual place of residence," and there are no charges of fraud on the part of the plaintiff or the officer, and no allegations of a defence, in whole or part, to the cause of action stated in the complaint. *Cully* v. *Shirk*, 76

2. Jurisdiction of the subject-matter means jurisdiction of the class of cases to which the particular case, in which the question raised, belongs. *McCoy* v. *Able*, 417

JURY.

1. *Advisory.—Court may Disregard its Findings*.—In a case of equity jurisdiction where the court for its information submits certain questions of fact to a jury, the court is at liberty to disregard the answers of the jury to interrogatories, and to render judgment in disregard of the findings. *Brundage* v. *Deschler*, 174

2. *Same.—Instructions to.*—In cases where the finding of the jury is merely advisory, and in no sense binding on the court, it is doubtful if the reversal of a judgment because of instructions given to the jury in any such case would be advisable. Certainly not, where, as in the case at bar, the record affirmatively shows that the court did not follow the findings of the jury. *Ib.*

3. *Filing Pleadings, After Swearing of—Reswearing of.—Unavailable Error on Second Trial.*—Where pleadings are filed in a cause after the jury have been sworn to try said cause, and the jury is not resworn after filing said pleadings, and there is a second trial of said cause, the failure to reswear the jury in the first trial is not error to be taken advantage of in the second. *Havens* v. *Gard*, 522

LIEN.

See Drainage, 1, 2; Mortgage, 2, 3; Partnership, 2; Practice, 27, 28; Vendor and Vendee.

1. *Payment.—Tender.*—To prevent a legal or equitable lien ripening into a title, the owner of the property must pay or tender the amount of the lien. *Reeves* v. *Grottendick*, 107

2. *Mortgage.—Ditch Assessment.*—When a person buys land subject to a mortgage, and the purchaser subsequently pays off said mortgage indebtedness, and there is a ditch assessment against said land, the purchaser can not, by so doing, be subrogated to the rights of the mortgagee under said mortgage and have the same declared a prior lien to said assessment, because the estate in fee and the mortgage estate meet in the same person, and the latter is, under the law, completely drowned. *Shirk* v. *Whitten*, 455

LIFE INSURANCE.

1. *General Agent, Who Is.—Powers of to Grant Extension of Time of Payment.*—An agent of a mutual life insurance company, assigned to the territory of a State, charged with the duty of soliciting applications for membership, collecting membership fees, organizing local aid societies, appointing sub-agents, and in addition thereto empowered "to assist in working within the territory" named, "and to do and perform such other acts and things as may be necessary to build up the interests and defend the rights of said life association in said territory," is a general agent, and has power to orally agree to an extension of the time of payment of dues, even when the policy would be avoided if payment had not been made within the time limited, unless an extension had been granted. *Painter* v. *Industrial Life Ass'n*, 68

2. *Same.—Waiver of Forfeiture by Accepting Payment.—Extension of Time of Payment.—Death on Day to Which Time of Payment was Extended.—Com-*

pany Liable.—A by-law of a mutual insurance company provided that full monthly payments were "due from each member on the first day of each calendar month, with the remainder of the month allowed as days of grace for payment," and that the membership "should not cease until after the days of grace" had expired. It was also provided that if any monthly payment was not paid to the association at its home office within the time as above stated, the membership should "cease and terminate, the certificate become null and void, and all money paid thereon be forfeited to the association, and credited to the contingent fund." The assured paid his instalment, due September first, on October 4; the one due October first, November first; the one due November first, December 2d; and the one due December first, by oral agreement with the general agent having the powers previously enumerated, was to have been paid January 5th; but before the close of business hours the insured suddenly fell dead.

Held, that the insurance company had extended the time of payment, and were liable. *Ib.*

3. *Same.—Declarations of President of Insurance Company after Death of Insured.*—Conversations had with the president of the insurance company after the death of the insured, tending to show the powers of the agent above mentioned, and also showing a willingness to have accepted the payments after the days of grace had elapsed, is admissible in evidence when taken in connection with the other facts. *Ib.*

MALICIOUS PROSECUTION.

1. *Excessive Damages.—When Verdict will not be Disturbed.—New Trial.*—In an action for malicious prosecution which involves the question of compensation for an injury to character, a new trial will not be granted on the ground of excessive damages, unless they are so outrageous as to induce the belief that the jury acted from prejudice, partiality or corruption. *Evansville, etc., R. R. Co. v. Talbot, 221*

2. *Same.—Witness.—Testimony of in Criminal Cause.—Admissibility of in Action for Malicious Prosecution.*—Where one of the appellants in the cause was a witness, and testified at the trial of the appellee on the charge of embezzlement, it was proper for the appellee in his action to recover damages for malicious prosecution on account of said charge of embezzlement, to prove what the testimony of said appellant was on the criminal trial. *Ib.*

3. *Same.—Instructions to Jury.*—An instruction in an action to recover damages for an alleged malicious prosecution, which stated, among other things, that the plaintiff before he could recover must prove by a preponderance of the evidence "that the defendants, or such as are held liable, caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plaintiff," is not objectionable on the ground that it assumes some of the defendants will be held liable, when taken in connection with a subsequent instruction which informed the jury that "there can be no finding against any defendant who is not shown to have been connected with the instigation or carrying on of the prosecution." *Ib.*

MANDAMUS.

See ELECTIONS, 3; SCHOOL TRUSTEE, 1 to 3.

1. *County Commissioners.*—A writ of mandate will not issue against a board of commissioners, when acting in a judicial capacity, to direct the performance of a judicial duty in any particular mode or to render any particular judgment. *State, ex rel., v. Board, etc., 90*

2. *Same.—Purchase of Gravel Road.*—Where the board of commissioners submits to the voters of a township the question of the purchase of a

gravel road, and the election results in favor of the purchase, but the board refuses to make an order for such purchase, mandamus will not lie to compel the board to make such order, as in such a case the board acts judicially. *Ib.*

3. *Same.—Adequate Legal Remedy.*—Mandamus will not lie where the party applying for the writ has an adequate legal remedy. The right of appeal is an adequate legal remedy, within the meaning of this rule. *Ib.*

MARRIAGE CONTRACT.

1. *Breach of.—Evidence.—Illicit Intercourse.—Violent Conduct of Defendant.*—Evidence showing all the facts in connection with the association of the plaintiff and defendant together and their treatment of each other, including their illicit intercourse with each other, and the defendant's violent conduct to the plaintiff, is proper. *Chamness* v. *Cox*, *118*

2. *Same.—Statute of Limitations.*—A right of action for a breach of promise to marry is not barred where the time between the first refusal to marry the plaintiff and the bringing of the suit is less than six years. *Ib.*

3. *Same.—Statute of Limitations.—Postponement of Marriage.*—If there is an agreement to marry, and the time for its consummation is postponed from time to time by the defendant up to a date less than six years prior to the commencement of the action when the defendant refused to marry the plaintiff, the action is not barred by the statute of limitations. *Ib.*

MARRIED WOMAN.

See CHATTEL MORTGAGE.

1. *Promissory Note.—Suretyship.—Innocent Purchaser.*—Under section 5119, R. S. 1881, a note made payable in bank, executed by a married woman as surety, is void as to her, in the hands of an innocent purchaser, for value, acquired in the regular course of business. She alone can claim the benefit of the statute. *Vories* v. *Nussbaum*, *267*

2. *Same.—Estoppel in Pais.—What is not.*—While a married woman is bound under our statute by an estoppel *in pais*, like any other person, the form of the contract (she signed the note apparently as principal) does not operate as such an estoppel where there was no statement or representation of any kind to indicate that she was the principal on the note. *Ib.*

3. *Same.—Consideration Paid to Husband.—Suretyship of Wife.*—The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety and not the principal in the note, notwithstanding the form of the contract. *Ib.*

4. *Estoppel.—Suretyship.—Representations.*—When a married woman represents that a loan, which is secured by mortgage on her lands, is for her own use, she will be estopped, as against one who in good faith has contracted with her in reliance upon her statements, from asserting that she is a surety, and not the principal in the transaction. *Taylor* v. *Hearn*, *637*

MASTER AND SERVANT.

1. *Action for Damages.—Injury of Infant.—Contributory Negligence.—Danger Known to Defendant.—Complaint.*—In an action by a minor, by his next friend, to recover damages occasioned by a personal injury, the complaint alleged that the appellee, who was an infant, without knowledge or experience of the dangerous properties of hot slag or cinder, was employed by the appellant to carry and wheel away from a furnace, and dump upon adjacent ground, a part of which was cov-

ment as to.—In an action to enforce a mechanic's lien against a church corporation, an averment in the complaint "that during the time the plaintiff was delivering and furnishing the bricks for said purpose, he notified the defendant corporation that he was furnishing the bricks for said structure" is sufficient without averring to what officer or person representing the corporation the notice was given. It is the statement of a fact and not of a legal conclusion. *Ib.*

8. *Same.—Description of Property in Notice.*—A description of the property in the recorded notice is sufficient which describes it as follows: "Your church property at the southeast corner of Alabama street and Merrill street, in the city of Indianapolis, Indiana, as well as upon the new church building (house) recently erected thereon by you," although the numbers of the lots and the name of the county are not given The complaint supplemented this description by averments making it full and specific. See Elliott's Supp., section 1690. *Ib.*

MEASURE OF DAMAGES.

See COMMON CARRIER, 1.

MISTAKE.

See MORTGAGE, 1.

MORTGAGE.

See LIEN, 2.

1. *Reformation.—Mutual Mistake.*—Where a husband joins his wife in signing and acknowledging a mortgage on the wife's real estate, but, by mutual mistake, the husband's name is omitted from the conveying clause, the mortgagee is entitled to have the mortgage reformed. *Collins* v. *Cornwell*, 20

2. *Money Advanced to Pay Off Liens.—Failure of Wife to Join in Mortgage.—Rights of Wife.—Section 2495, R. S. 1881, construed.*—The defendant, in common with several others, owned a tract of land. He and his wife executed mortgages on his undivided interest to the plaintiff to secure the indebtedness of the husband for an amount in excess of his said interest. The entire tract was heavily encumbered. The defendant acquired the interest of the others, upon the understanding that he was to assume and pay off the mortgages. The plaintiff agreed to furnish a sufficient amount of money to pay off and discharge all of said liens except those owned by himself. He did so, and the defendant executed a mortgage to the plaintiff on the entire tract for the money so paid by the plaintiff and for the amount of his own mortgages. The defendant's wife refused to join in this mortgage.

Held, that the mortgage executed to the plaintiff by the defendant represented the whole of the consideration paid by the defendant for the conveyance of the property to him, and that the plaintiff was as much entitled to the protection of section 2495, R S. 1881, which declares that although a wife do not join in a mortgage, given to secure the whole or any part of the purchase-money, she is not entitled to any interest as against the mortgagee, as he would have been if he himself had been the vendor.

Held, also, that the mortgage, in so far as it represented the money paid as purchase-money, was superior to any interest of the wife, but not as to the amount paid in extinguishing the mortgages executed by the husband upon his own interest. *Butler* v. *Thornburg*, 237

8. *Foreclosure of.—Redemption by Subsequent Mortgagee.—Enforcement of Lien. Estoppel.—Complaint.*—A mortgagee from a husband who redeems the land from a sale on foreclosure of a prior mortgage executed by the husband and wife, has a lien which he may enforce, and in a suit to enforoe such lien, the wife can not successfully assert that the re-

demption was not an effective one, the holder of the certificate having assented thereto, and having accepted the redemption money. It is immaterial that the complaint failed to allege title to the land in the husband, the facts pleaded showing that he had title thereto.
Scobey v. *Kinningham*, 552

4. *Same.—Capacity in which Redemption is Made.—Estoppel.*—The acceptance of the redemption money by the holder of the sheriff's certificate estops him, but it does not estop the wife from availing herself of such rights as the statute confers upon her. She is not estopped from questioning the capacity in which the appellant acted in redeeming the land, and in asserting that he was the owner of the land, and that he redeemed it in that capacity. *Moberry* v. *City of Jeffersonville*, 38 Ind. 198, *McEwen* v. *Gilker*, 38 Ind. 233, and *Kretsch* v. *Helm*, 45 Ind. 438, held to be overruled. *Ib.*
5. *Same.—Absolute Deed As Mortgage.*—The plaintiff is not estopped from asserting that he was not the owner of the land, but a mortgagee, although his deed was absolute on its face, and was recorded among the conveyances. *Ib.*
6. *Same.—Mortgagor's Title.—Estoppel.*—A mortgagor is estopped to aver, as against his mortgagee, that he had no title to the land mortgaged. *Ib.*

MUNICIPAL CORPORATIONS.

1. *Street Improvement in City.—Appeal.—How Transcript Construed.—Precept.* —By statute the transcript certified to the circuit court by the city clerk in an appeal from a street improvement, constitutes the complaint of the contractor; and it should not be construed with rigid strictness against him, and ought to stand, unless there is some defect in it which affects the substantial rights of the parties.
Reeves v. *Grottendick*, 107
2. *Same.—Right of Appeal Statutory.*—The right to appeal from a precept is a statutory right; and there is no inherent right of appeal from it. *Ib.*
3. *Same.—Questions Tried on Appeal.—Legislature May Restrict.*—The Legislature has the power to declare what questions shall be tried on an appeal, and may preclude parties from litigating such as it may deem properly settled by the decision of the municipal officers. *Ib.*
4. *Same.—Questions Antecedent to Making of Contract.—Transcript, What Included.*—No question that reaches back of the time of the contract for street improvement can be litigated on an appeal from a precept; and no irregularity in the proceedings prior to that time can be drawn in question. The steps taken in the proceedings prior to that time need not be incorporated in the transcript. *Ib.*
5. *Same.—Affidavit for Precept Made by Only One Contractor.*—The affidavit of one of two or more joint contractors, to obtain a precept, is sufficient. *Ib.*
6. *Same.—Description of Lot Assessed.—Sufficiency of Affidavit as to.*—If the notice to the property-owner of the amount of the assessment contains a description of the property owned, and such notice is combined with the affidavit for a precept, the latter need not contain a description of the lot against which it is desired to obtain a precept. *Ib.*
7. *Same.—Sufficiency of Affidavit for a Precept.*—It is sufficient if the affidavit for a precept substantially conform to the statutory requirements; and it need not contain a recapitulation of all the steps that have been taken previous thereto in the proceedings. Section 3165, R. S. 1881. *Balfe* v. *Johnson*, 40 Ind. 235, and *Clements* v. *Lee*, 114 Ind. 397, distinguished. *Ib.*

8. *Same.—Appeal from Several Precepts.—Some of Affidavits Insufficient.*—If there is a joint appeal from several precepts, and the several precepts are included in one transcript, and on such appeal the transcript is treated by the appellants as a single complaint, the overruling of a demurrer for want of facts is not an available error in the Supreme Court, even though some of the affidavits for precepts are defective *Ib.*

9. *Same.—Estimates of Costs, Engineer Makes.*—The city civil engineer is the proper officer to make the estimate and apportion the costs to each lot or tract of land. *Ib.*

10. *Same.—Variance of Names of Contractors in Precept and Council Proceedings.*—A variance between the names of the contractors as set out in the precept and in the proceedings of the council is immaterial if it reasonably appears that one and the same person is meant. *Ib.*

11. *Same.—Assessment.—What is Sufficient.—Allowing Credit on Former Void Assessments.*—If the estimate of the city civil engineer is adopted and approved by the common council, that is a sufficient assessment; and the fact that the resolution adopting the estimate provides that property-owners who have paid part of former assessments which have been vacated, does not impair the effectiveness of such assessment. *Ib.*

12. *Same.—Assessment Void as to Other Property-Owners.*—The owner of property against which a precept to collect an assessment has been issued, can not object to its enforcement on the ground that assessments against neighboring lots are void. *Ib.*

13. *Same.—Vacating Void Assessment.—Re-Assessment.—Name of Owner Not Given.*—If an assessment is void for not giving the name of the owner of the lot assessed, it may be vacated by the common council, and a new assessment made. A failure to state the name of a lot-owner correctly is sufficient to warrant a vacation of the asssessment. *Ib.*

NATIONAL BANKS.

1. *Assets Held in Trust.—For What Purpose.*—The assets of a bank are held in trust: 1. For the payment of its indebtedness. 2. For the distribution among the stockholders of the surplus only, if any, after the payment of such indebtedness. *McCann v. First National Bank,* 95

2. *Same.—Withdrawal of Assets—When Can Not be Done*—There can be no voluntary withdrawal of any portion of the assets of a bank, where the effect of such withdrawal will be to impair the capital stock, or endanger the security of its creditors. Where the capital stock of a bank is reduced to meet an impairment and to escape an assessment by the controller of the currency, there can be no withdrawal of depreciated securities which caused the impairment. *Ib.*

NATURAL GAS.

See INJUNCTION, 2 to 4, 10, 11.

1. *Entry on Land Pending Appeal.—Act Valid.*—That part of the act of the Legislature (Acts 1889, p. 22) authorizing natural gas companies in appropriating land for a right of way, to cause the assessment of damages to be made, to appeal therefrom, and, on paying to the clerk of the court the amount of damages assessed, to enter on the land appropriated pending the appeal, is valid.
Consumers', etc., Co. v. Harless, 446

2. *Same.—Validity of Act, Restrictions on Citizens of this State.*—The act of 1889, authorizing citizens or corporations of this State to exercise the right of eminent domain, is not invalid on the ground that it does not authorize citizens or corporations of other States to exercise such right. *Ib.*

3. *Same.—Local Law, is Not.*—The natural gas law of 1889 is not subject to the objection that it is local or special. *Ib.*

NEGLIGENCE.

See BRIDGES, 1; CONTRACT, 5; RAILROAD, 3, 6, 8, 9, 25.

1. *When Question of Law for the Court.*—Where the facts are undisputed, and can lead to only one conclusion, the question of negligence is a question of law for the court. *Board, etc.,* v. *Chipps,* 56

2. *Negligent Use of Locomotive Whistle.—Frightening Horse which Throws and Injures Plaintiff.*—The ordinary use of a locomotive or engine, and the ordinary sounding of its whistle and escape of steam is not negligence; but the negligent and careless sounding of the whistle and blowing off of steam in such a way as to cause it to make an unusual noise, whereby the plaintiff's horse, which he is riding, throws and injures him, is actionable negligence. *Indianapolis, etc., R. W. Co.* v. *Boettcher,* 82

3. *Same.—Wilful Injury.—What is.—Contributory Negligence.*—Where an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury is not negligently, but wilfully inflicted; and when the injury sued for is alleged either in terms or in substance to have been wilfully or purposely committed, contributory negligence is no defence. *Ib.*

4. *Same.—Evidence of Locality of Injury.*—The plaintiff may show the nature and surroundings of the place where the injury was inflicted. *Ib.*

5. *Same.—Degree of Caution.—Anticipating Injury.*—More vigilance and caution are required in the performance of acts at a place where injury is liable to occur from their performance than where no injury may be anticipated. *Ib.*

6. *Same.—Evidence of Gentleness of Horse Before and After Accident.*—Where it was sought to show that the horse frightened by the blowing of a steam whistle was at the time gentle, the admission of testimony of former and prior use, and that he was always gentle at such times, even though it were inadmissible, is harmless error. *Ib.*

7. *Same.—Instructions.*—For what are proper instructions in the case, see opinion. *Ib.*

8. *Directing Verdict for Defendant.—When Should not be Done.*—The court should not direct a verdict for the defendant, in an action to recover damages on account of the negligence of the plaintiff, if the evidence is such that a fair inference may be drawn from it that the defendant was guilty of negligence producing the injury, and that the plaintiff was not guilty of negligence which contributed to such injury. *Rush* v. *Coal Bluff, etc., Co.,* 135

9. *Same.—When Court may Direct Verdict for Defendant.*—If from the evidence no reasonable inference of negligence on the part of the defendant causing the injury can be drawn, or there is but one reasonable inference to the effect that the plaintiff's negligence contributed to the injury, then it is the duty of the court, on request, to direct the jury to return a verdict in favor of the defendant. *Ib.*

10. *Same.—Inference to be Drawn from Evidence.—Directing Verdict.*—If the evidence is such that impartial men may differ as to the conclusion to be drawn from it, the court must submit the question of negligence to the jury; but if there is no evidence supporting any particular fact or theory of the case and authorizing a reasonable inference of such fact or theory essential to a recovery or sufficient to create a reasonable difference of opinion in the minds of impartial men sitting in judgment on the case, then it is the duty of the court to direct the jury to return a verdict against the party having the burden of establishing the material facts essential to a recovery. *Ib.*

11. *Same.—Mine.—Injury in Shaft of.*—For a case where the defendant is

not liable for an injury inflicted by a descending cage, in the shaft of a mine, see opinion. *Ib.*

12. *Railroad.—Injury Resulting in Death.—Widow and Children.—Implied Damage.—Presumption.*—Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kinfolks sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children.
Korrady v. *Lake Shore, etc., R. W. Co.*, 261

13. *Same.—Answers to Interrogatories.—Question of Law.*—Where the facts covering the question of contributory negligence are fully stated in answers to interrogatories, or in a special verdict, it is the duty of the court to decide the question as one of law in cases where the facts lead to only one conclusion. *Ib.*

14. *Same.—Railroad Crossing.—Contributory Negligence.*—When a person voluntarily attempts to cross a track in front of a moving train which he sees not far distant approaching the crossing, he is guilty of contributory negligence, and can not recover. *Ib.*

15. *Same.—Negligence of Defendant.—When Unavailing.*—If the plaintiff's negligence proximately contributed to his injury, he can not reeover, no matter how negligent the defendant may have been, unless such negligence is so gross as to imply a wilful intention to inflict the injury. *Ib.*

16. *Same.—Rate of Speed.—Municipal Ordinance.*—It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed was eighteen miles an hour where a municipal ordinance limited the speed at that point to ten miles an hour. *Ib.*

17. *When Question of Contributory Negligence is for Jury.*—Where the circumstances of a particular case are such as to warrant different inferences, so that one impartial and sensible man may draw the inference and conclusion that the injured person was guilty of contributory negligence, while another man, equally impartial and sensible, may draw a different conclusion, the court will not decide as a matter of law the question of contributory negligence, but will leave it to the jury under proper instructions.
Cleveland, etc., R. W. Co. v. *Harrington*, 426

18. *Contributory.—Complaint.—Specific Averment.*—A general averment in the complaint that the injured party was himself free from fault or negligence is sufficient, unless it is overcome by the specific averment of other facts, showing notwithstanding the general averment that he was guilty of contributory negligence.
Louisville, etc., R. W. Co. v. *Hanning*, 528

19. *Contributory.—Railroad.—Infant.—Improper Grade at Crossing.*—In an action against a railroad company to recover damages for personal injuries alleged to have been sustained by the plaintiff, by reason of being thrown out of a vehicle while crossing the defendant's track, at a highway or street crossing where the grade of the railroad had been constructed and maintained at a much higher grade than that of the highway, the fact that the injured party was an infant, and was driving the team at the time of the accident, does not of itself establish contributory negligence. *Louisville, etc., R. R. Co.* v. *Pritchard*, 564

20. *Same.—Synopsis of Evidence.*—The evidence fails to establish contribu-

tory negligence when it shows that the horses were gentle and docile; that the injured party, a girl of twelve, had driven them together a number of times within a short time previous to the accident; that she had driven in the vicinity of the railroads and cars, and across railroads; that the horses were not afraid of or liable to be frightened by the cars, and that she would have been able to have stopped them at the time of the accident if the railroad had been properly constructed at the crossing. *Ib.*

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTE.

NEW TRIAL.

See MALICIOUS PROSECUTION, 2; PRACTICE, 40; SPECIAL FINDING, 2.

1. *Bill of Exceptions For, Not Necessary.*—A motion for a new trial does not require a bill of exceptions to make it a part of the record. *Smith* v. *James, 131*

2. *Motion for.—When Filed too Late.*—Where a case was tried at the May term, 1889, and the verdict was returned June 7th, 1889, the court adjourning for the term on June 8th, and the next term convened September 2d, 1889, a motion for a new trial filed on October 4th, 1889, was not filed in season. See section 561, R. S. 1881. *Louisville, etc., R. R. Co.* v. *Summers, 241*

NOTICE.

See ADMINISTRATOR'S SALE, 3, 4; APPEAL, 1; MECHANIC'S LIEN, 1, 2, 4 to 6; RAILROAD, 27.

Sufficiency of Proof of Publication.—The proof of publication is sufficient when the affidavit of the publisher of the newspaper in which the notice was published states that "the notice was duly published in said paper for three weeks consecutively, the first of which publications was on the 11th of September, 1890, and the last on the 25th day of September, 1890. The reasonable and fair construction of the affidavit is that the first and third publications were on the first and last days mentioned, and the second on an intervening day. *Curry* v. *State, etc., 439*

NOTICE.

See TAXES, 2, 3.

OBSTRUCTION OF HIGHWAY.

See CONSTITUTIONAL LAW, 1.

OCCUPYING CLAIMANT.

See REAL ESTATE, 8.

OFFICE AND OFFICER.

1. *Right to make Contracts with Ministerial Officers.*—Officers controlling the affairs of a public corporation may contract with ministerial officers of the corporation, unless such contracts are prohibited by statute. *Board, etc.,* v. *Mitchell, 370*

2. *Construction of Public Work.—Performance of Duty.—Presumption.*—A public officer, whose duty it is to construct or supervise a public work, is presumed to rightfully discharge his duty, and what he does within the scope of his authority is regarded as *prima facie* right, and in accordance with the law. *Racer* v. *State, etc., 393*

3. *Refusal to Perform Positive Duty.*—If in any case a public officer can excuse a refusal to perform his positive duty because of the lack of time, he must state specific facts clearly and fully, showing why the

duty can not be performed. Mere general statements can not supply the place of facts. *Cole* v. *State, ex rel.*, 519

ORDINANCE.

See RAILROAD, 20, 21.

PARTIES.

See APPEAL, 1, 3; FRAUD, 4.

1. *Foreclosure of Mortgage.—Death of Mortgagor.—Supplemental Complaint.*—In an action to foreclose a mortgage, if the mortgagor, or the owner of the equity of redemption, die, his administrator should be made a party defendant, if he enters no appearance, by a supplemental complaint and service of process. *Holland* v. *Holland*, 196
2. *Same.—Appearance.—Amending Complaint.—Demurrer by Administrator.*—In such an instance an appearance does not relieve the plaintiff from filing such additional pleading. The order book entries, making the administrator a party, can not be resorted to in aid of the original complaint; and a demurrer by the administrator to the complaint for want of facts is well taken. *Ib.*
3. *Same.—Foreclosure of Mortgage.—Wife of Owner of Equity of Redemption.—Death of Husband.*—The wife of the owner of the equity of redemption is a proper party in the foreclosure of a mortgage; and when he dies she is a necessary party. If the land has been conveyed by the mortgagor, then the wife of the grantee is a proper party defendant. *Ib.*
4. *Covenant Running with Land.—Action to Enforce—Wife Proper Party Plaintiff.*—A wife's interest in the lands of her husband has been so enlarged by section 2508, R. S. 1881, that while she may not be a necessary party plaintiff, she is nevertheless a proper party plaintiff with her husband in an action to compel a railroad company to maintain a crossing over its right of way, and to maintain cattle guards, fences, etc., in accordance with a provision in a deed, by the husband and wife of the land, for the right of way. *Lake Erie, etc., R. R. Co.* v. *Priest*, 413

PARTNERSHIP.

1. *Assets Used to Pay Individual Debts of Partners, Application of.—Insolvency of Firm.*—As between themselves, partners have the right to insist that partnership assets shall be first used for the payment of the firm's debts; but this right they may waive, and may transfer or encumber the firm property to pay or secure *bona fide* debts of the individual partners, for which the firm is not liable; and the transaction can not be successfully attacked either by a creditor or by a receiver of the firm appointed by reason of the insolvency of the firm. *Johnson* v. *McClary*, 105
2. *Same.—Lien of Creditors.*—Creditors of a partnership have no lien upon or special interest in partnership property, except through the rights of the partners. *Ib.*
3. *Same.—Transfer by One Member of Firm of Assets to Pay His Individual Debt.—Consent of His Partners.*—Without the consent of his partners, one partner can not transfer the assets of the partnership to the payment of his individual debt; and unless all the partners consent to or ratify such transfer, a receiver of the firm may follow and recover such assets, especially if they are essential to pay partnership debts. *Ib.*
4. *Partner's Interest.—Sale of.—Promissory Note.—Set-Off.*—Where one partner transfers all his right, title and interest in the assets of the firm, including the books and accounts of the partnership, to a continuing member of the firm, or another, and the outgoing member receives in payment of his interest the note of the purchaser, the maker of the

note can not set off an account apparently due the firm from the member whose interest was transferred. *Houk* v. *Walker*, 231

5. *Same.*—A sale by one partner to a continuing member of the firm, or to another, in the absence of any special agreement to the contrary, carries with it the actual interest of such partner. The presumption is that the account of such partner with the firm was taken into account, and his interest in the partnership increased or diminished according to the state of his account, and that such selling partner, in the absence of a special agreement to that effect, is not liable to account to the purchaser for any sum which may be due from him to the firm, and *prima facie*, such transfer cancels his account, in so far at least as the purchasing partner is concerned. *Ib.*

6. *New Trial.*—In an action to compel an accounting and settlement of a partnership, it is as necessary to prove on trial that the partnership debts were paid as it is to allege it in the complaint, and until the creditors are all paid, no member of the firm can recover for his own use any part of the partnership assets, and a failure to prove such fact is a ground for a new trial. *Powell* v. *Bennett*, 465

7. *Same.*—*Evidence.*—Under the complaint it was competent for the appellee to prove that the claims in favor of the firm had been collected, and that the partnership debts had been paid. *Ib.*

PAYMENT.

See TENDER.

PENALTY.

See PLEADING, 4.

PERSONAL INJURIES.

See RAILROAD, 10.

PLEADING.

See COMMON CARRIER, 1; DRAINAGE, 2; EASEMENT; FRAUDULENT CONVEYANCE, 1; MASTER AND SERVANT, 1, 4; NEGLIGENCE, 18; PRACTICE, 17, 24, 28; QUIETING TITLE, 1, 2; RAILROAD, 1, 4, 6, 13, 14, 18, 25; TAXES, 2.

1. *Supplemental Complaint.*—*Demurrer.*—A demurrer will not lie to a supplemental complaint. *Lewis* v. *Rowland*, 37

2. *Action to Recover for Injuries.*—*Averment of Freedom from Fault.*—In an action to recover for injuries, the general averment that the plaintiff was free from fault will be overcome only when the specific facts stated by the plaintiff show contributory negligence. *Toledo, etc., R. R. Co.* v. *Adams*, 38

3. *Complaint.*—If the plaintiff is entitled to any substantial relief, on the facts stated in his complaint, a demurrer thereto should be overruled. *Linder* v. *Smith*, 147

4. *Action to Recover Penalty.*—*Each Day a Separate Offence.*—*Paragraphs.*—In an action for the recovery of a penalty for an offence which is shown to be continuous, the penalty being fixed at so much for each day of its continuance, it is not necessary to declare in separate counts for each day's penalty, but all may be grouped together in one count, covering the entire period. *Toledo, etc., R. R. Co.* v. *Stephenson*, 203

5. *Complaint.*—*Contributory Negligence.*—*Sufficiency of Averment as to.*—In an action to recover damages for personal injuries resulting in death, an averment in the complaint that the decedent was free from contributory negligence is sufficient, unless facts specially pleaded clearly

show that he was guilty of contributory negligence.
Louisville, etc., R. R. Co. v. *Summers*, 241

6. *Complaint.—Damages.—Demurrer.*—If a complaint shows that the plaintiff is entitled to some damages or to some relief, although not so much or so great as that demanded, it will repel a demurrer.
Korrady v. *Lake Shore, etc., R. W. Co.*, 261

7. *Title to Real Estate.—Deed.—Complaint.*—When the plaintiff asserts title to real estate, and bases his claim upon a certain deed, and the record shows that a deed regular in form, clear in its terms, and apparently founded upon a valuable consideration, was executed by the grantor to the grantee, and there are no facts tending to show fraud or mistake, it is error to sustain a demurrer to the complaint.
Ewing v. *Lutz*, 361

8. *Answer Can Not Perform a Double Office.*—A single paragraph of answer can not perform a double office. It can not be good as a denial and also as a plea in confession and avoidance. *Racer* v. *State, etc.*, 393

9. *Same.—Plea in Confession and Avoidance.*—An answer can not be good as a plea in confession and avoidance unless it overcomes by affirmative allegations the *prima facie* case which it confesses and seeks to avoid. The affirmative allegations are the controlling ones, and those which are equivalent to the denials embraced in the answer of general denial are without influence. *Ib.*

10. *Same.—Must be Judged from General Scope.—Matters of Judicial Knowledge.—Averments Contradicting.*—A pleading is to be judged from its general scope and tenor, and not from fragmentary statements or general conclusions cast into it. The general statements must yield to the specific allegations. Averments contradicting matters of which judicial knowledge is taken are generally unavailing. *Ib.*

11. *Same.—Must Proceed Upon Definite Theory.*—A pleading must proceed upon some definite theory, and must be good upon the theory on which it professes to proceed. *Ib.*

12. *Complaint.—Construction of.—What Court Will Look to.*—In construing a complaint, and in determining the rights of the parties thereunder, the court will look to the nature of the acts alleged, and if such acts are lawful within themselves, the use of such epithets as "unlawfully," "maliciously" and "wantonly," in the complaint, can not make them unlawful. *Tyner* v. *People's Gas Co.*, 408

13. *Defects Cured.*—In an action on a note and for the foreclosure of a mortgage, facts which are not averred in the pleading, but which appear in copies of the note and mortgage therein set out, cure the deficiency of the paragraph. *Taylor* v. *Hearn*, 537

14. *Same.—Complaint.—Sufficiency of Demurrer.*—A complaint which states an immaterial fact is not bad on demurrer if it also states a cause of action for some relief. *Ib.*

15. *Amended Complaint.—Answer.—Statute of Limitations.*—Where an original complaint is amended so as not to change the cause of action, an answer setting up the statute of limitations as to the amended complaint is not good unless such answer would have been available as to the original complaint. *Ross* v. *State, ex rel.*, 548

16. *Complaint.—Averment as to Special Damages.*—If a plaintiff states facts constituting a cause of action, an error in laying special damages does not invalidate the complaint when legal damages are recoverable.
Hoosier Stone Co. v. *Louisville, etc., R. W. Co.*, 575

POLICE POWER.

See CONSTITUTIONAL LAW, 3.

POSSESSION.

See REAL ESTATE, 7, 8.

PRACTICE.

See ABATEMENT; BILL OF EXCEPTIONS; CHANGE OF VENUE; COUNTY COMMISSIONERS, 4; DEMURRER TO EVIDENCE; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; NEW TRIAL; SPECIAL FINDING; TRIAL BY JURY; VERDICT.

1. *Non Est Factum.—Reply.—Plea of Estoppel.*—A plea of *non est factum* closes the issues, and does not require a reply; but a reply of estoppel may be pleaded to such an answer. *Brickley* v. *Edwards*, 3

2. *Same.—Motion to Strike Out Pleading.—Overruling.*—Overruling a motion to strike out a pleading is not such an error as will reverse the case. *Ib.*

3. *Erroneously Sustaining Demurrer to Reply.—Special Findings of Fact Curing Error.*—Error occasioned by improperly sustaining a demurrer to a reply is cured if the special finding of facts show that the plaintiff was not deprived of putting his whole case into the record for review by the Supreme Court. *Miller* v. *Hardy*, 13

4. *Striking Out Exhibit.*—In order to present a question on a ruling striking out an exhibit to a complaint, the exhibit struck out must be brought into the record by bill of exceptions. *Collins* v. *Cornwell*, 20

5. *Sustaining Demurrer to Special Answer.—Facts Provable Under General Denial.*—It is not error to sustain a demurrer to a good affirmative paragraph of answer when all the allegations of facts contained in it can be proved under the general denial. *Palmerton* v. *Hoop*, 23

6. *Conflict of Evidence.*—If the evidence, though conflicting, tends to sustain the finding, the finding will not be disturbed. *Lewis* v. *Rowland*, 37

7. *Conflict of Evidence.*—The mere weakness or conflict of evidence will not justify the setting aside of the finding of the trial court. There must be an entire want of evidence on some material point. *Coon* v. *Cronk*, 44

8. *Testing Complaint for First Time on Appeal.—Rule as to.*—Where the sufficiency of a complaint is questioned for the first time in the Supreme Court by assignment of error, it will withstand such attack if it be sufficient to bar another action for the same cause, and would be good after verdict. *Board, etc.*, v. *Chipps*, 56

9. *Same.—Sustaining Demurrer to Good Paragraph.—Facts Provable Under General Denial.*—It is not error to sustain a demurrer to a good paragraph of answer if all the matters therein averred are admissible in evidence under the general denial, which is pleaded. *Ib.*

10. *Theory of Trial Court.—Appeal.*—The appellate tribunal will act upon the theory voluntarily assumed in the trial court. *Reeves* v. *Grottendick*, 107

11. *Same.—Venire de Novo.—Object.—When Effective.*—A motion for a *venire de novo* reaches matter of form, and is effective only when the verdict is materially defective. *Ib.*

12. *Instructions.—Written.—Commenting on.—Waiver.*—The practice of commenting on written instructions condemned. *Chamness* v. *Cox*, 118

13. *Striking Out Interrogatories.*—It is not error to strike out irrelevant interrogatories addressed to the opposite party, nor matters about which there is no dispute. *Stevens* v. *Flannagan*, 122

14. *Competency of Witness.—Question under Section 630, How Reserved.*—A question upon the competency of a witness may be reserved under the provisions of section 630, R. S. 1881; and to present such a question it is unnecessary to bring all the evidence into the record. But to be available so much of the evidence must be stated as will enable the

appellate tribunal to clearly understand the nature and effect of the ruling of the trial court and to see its prejudicial character.
Smith v. *James*, *131*

15. *Same.—Competency of Evidence.—Reserved Question under Section 630.*—An independent and distinct ruling upon the admissibility of evidence may be presented on appeal as a reserved question of law under section 630; but the questions and answers connected with other evidence can not be so reserved without bringing in all the evidence upon the subject to which such questions and answers relate. *Ib.*

16. *Cross-Errors.*—For the practice relative to cross-errors, and the right to costs on reversal, see opinion. *Patoka Tp.* v. *Hopkins*, *142*

17. *Sufficiency of Pleading.—Review on Appeal.*—Where a demurrer to a paragraph of a complaint is overruled, but plaintiff amends it before judgment, the defendant can not question the sufficiency of the original paragraph on appeal. *Travellers Ins. Co.* v. *Martin*, *155*

18. *Venire de Novo.—When Lies.*—A *venire de novo* will be awarded only when the verdict is defective in form. *Ross* v. *Hobson*, *166*

19. *Striking Out Pleading.—Making Part of Record.*—If part of a pleading is stricken out on motion, no error can be assigned thereon unless such part of the pleading is made a part of the record by a bill of exceptions. *Holland* v. *Holland*, *196*

20. *Same.—Overruling Motion to Strike Out not Error.*—Overruling a motion to strike out a part of a pleading is not such an error as will reverse the case. *Ib.*

21. *Amendment of Complaint After Evidence Heard.*—It is not error to allow an amendment to a complaint after the evidence is heard, even though such amendment has the effect to make a bad complaint a good one.
Toledo, etc., R. R. Co. v. *Stephenson*, *203*

22. *Sustaining Demurrer.—Harmless Error.*—Where a demurrer was sustained to a paragraph of answer, and all the evidence that could have been given to support said paragraph was admissible under other paragraphs, the error, if such it was, in sustaining the demurrer, is not an available error on appeal. *Butler* v. *Thornburg*, *237*

23. *Substitution of Defendant.—Railroad.—Consolidation of Companies.*—Where, in an action to recover damages for personal injuries against a railroad company, it was shown to the court by verified petition that after the commencement of the suit the then defendant corporation, with certain other railroad corporations, had merged and consolidated their respective rights and franchises, and had thereby formed a new and consolidated corporation, which had succeeded to all the rights and assumed all of the liabilities of all the original corporations, including the liability for the appellee's cause of action, it was proper for the court to permit the substitution of said new and consolidated corporation in place of the original defendant.
Louisville, etc., R. R. Co. v. *Summers*, *241*

24. *Complaint.—Harmless Error.*—Where the jury found for the plaintiff on the second paragraph of his complaint, erroneous rulings respecting the first paragraph were harmless. *Puterbaugh* v. *Puterbaugh*, *288*

25. *Answer.—Reply in General Denial.—Proof Under.*—The plaintiff, under a reply of general denial, is not confined to negative proof in denial of the facts stated in the answer, but may introduce proof of facts independent of those alleged in the answer, but which are inconsistent therewith, and tend to meet and break down the defence.
Balue v. *Sear*, *301*

26. *Trial.—Failure of Party to Appear.*—Where a party fails to appear when

a case is called for trial, a jury need not be impanelled to try the cause. The trial may be had before the court. *Coleman* v. *Floyd*, *330*

27. *Same.—Suits to Enforce Liens.—How Triable.*—Suits to enforce liens are triable by the court. *Ib.*

28. *Same.—Suit to Enforce Lien.—Money Judgment.—Complaint.—Demurrer.* —In a suit to enforce a lien, if the complaint is sufficient to entitle the plaintiff to a money judgment, it will prevail against a demurrer. *Ib.*

29. *Repeating Instructions Unnecessarily.*—It is error for the court to repeat in the charge rules of law, though applicable to the case, in such form as to give to them such an undue prominence that they may mislead the jury. *Fowler* v. *Wallace*, *347*

30. *Same.—Contradictory Instructions.*—The court can not by contradictory instructions leave to the jury the duty of determining which of the two lines of instructions shall be followed, or what rule of law shall control the case. *Ib.*

31. *Same.—Objections to Evidence.*—Specific objections to evidence must be stated to the trial court, and the objections as stated must be brought into the record on appeal. *Ib.*

32. *Supreme Court.—Insufficiency of Brief.*—Where a brief filed in the Supreme Court contains nothing but a bare assertion of errors, no question is presented thereby for the consideration of the court. *Bonnel* v. *Shirley*, *362*

33. *Demurrer.—When Sustaining of Unavailable Error.*—There is no available error in sustaining a demurrer to a paragraph of an answer where the same evidence is admissible under other paragraphs of the answer which are allowed to stand. *Racer* v. *State, etc.*, *393*

34. *Motion to Dismiss Appeal.—Bill of Exceptions.*—Unless the motion to dismiss an appeal from a board of county commissioners is incorporated in a bill of exceptions, no question of the lower court's ruling thereon is presented on appeal to the Supreme Court. *McCoy* v. *Able*, *417*

35. *Same.—Objection to Jurisdiction.*—An objection that the court has no jurisdiction of the subject-matter may be interposed at any time, and such objection needs for its exhibition neither a formal motion nor a bill of exceptions. *Ib.*

36. *Motion to Make More Specific.—How Made Part of Record.*—A motion to make a complaint more specific is not a part of the record unless brought into such record by a bill of exceptions. *Line* v. *State, ex rel*, *468*

37. *Same.—Demurrer to Complaint in Action on Bond.—Specifications of Error.—Assignment of Error.*—The particular ruling on a demurrer to separate breaches of a bond assigned in the complaint must be specified in the assignment of error to present on appeal a question on a ruling thereon. *Ib.*

38. *Same.—Suit on Judgment Pending Appeal.*—Parties are not precluded from suing on a judgment or from prosecuting collateral or independent proceedings after an appeal is taken, although a supersedeas is granted. *Ib.*

39. *Answer.—Filing During Trial.*—As to whether an answer should be permitted to be filed in a cause during trial is a matter of discretion with the court, and can only be taken advantage of when there is an abuse of discretion. *Havens* v. *Gard*, *522*

40. *Error.—Improper Assignment of.—Motion for New Trial.*—Error can only

be assigned on a question that was presented and ruled upon by the court below, and where a motion for a new trial in the court below was to the whole cause, and the assignment of error was in the ruling of the court "in overruling appellant's motion for a new trial on the cross complaint," there is no question presented for the decision of this court on appeal. *Klinger* v. *Smith*, 524

PRECEPT.

See MUNICIPAL CORPORATIONS, 1, 5 to 10.

PRIORITY OF LIEN.

See DRAINAGE, 1.

PROMISSORY NOTE.

See MARRIED WOMAN, 1; PARTNERSHIP, 4.

1. *Payable in Bank.—Note Executed by Illegal Corporation.*—The maker of a note, payable in bank, to an illegal corporation, which is afterwards annulled by a decree of court is, as against an innocent endorsee of the note for value, estopped to deny its existence or its capacity to contract. *Brickley* v. *Edwards*, 3

2. *Payable in Bank.—Transfer to Plaintiff Without Consideration.—Answer.—Sufficiency of.*—In an action upon a promissory note, payable at a bank in this State, when it is averred in the complaint that it was transferred before due, for value, and was taken by the plaintiff in good faith, etc., an answer is good which avers that the note was, and at all times had been, the property of the payee; that the plaintiff had no actual interest in it, and that it was transferred to him without consideration, for purposes of collection only, and to prevent the defendant pleading as a set-off against it certain indebtedness due to him from the payee. *Deuel* v. *Newlin*, 40

PROXIMATE CAUSE.

See RAILROAD, 3.

PUBLICATION.

See NOTICE.

QUIETING TITLE.

See TAXES, 4.

1. *Conveyance of Land.—Oral Contract for.—Part Performance.—Complaint.—Motion to Make More Specific.*—The complaint alleged that the plaintiff was a nephew of the deceased, and had lived with him many years; that he was the sole heir of the deceased, and claimed to be the owner of the land described in the complaint, the title to which he was seeking to quiet; that deceased entered into a parol contract with the plaintiff agreeing to convey said premises to him, in consideration of love and affection, and for the further consideration that the plaintiff would assist with his labor, time and money in the erection of a house and barn on the premises, and take possession when married, and occupy the same and make valuable and permanent improvements, and that the plaintiff should pay deceased for life one-half of the crops raised on the premises. The complaint further alleged that the plaintiff accepted the proposition and performed his part of the contract in full, but that the deceased died without fulfilling his part of the agreement; that defendant claimed title to such premises, adverse to plaintiff, and that her claim was without right, and cast a cloud on plaintiff's title.

Held, that a motion to make the complaint more specific was properly overruled, and that it was not necessary to give the items of the consideration since it was not an action for the recovery of money.

Held, also, that as the complaint showed that, prior to deceased's death, the plaintiff had done all he had agreed to do, the time for making the conveyance was not material. *Puterbaugh* v. *Puterbaugh*, 288

2. *Same.—Complaint.—Compensation in Damages.*—Under the statutes of this State, in a suit to quiet title, where the plaintiff seeks relief upon an oral contract for the sale of land, it is not necessary to aver in the complaint that the plaintiff can not be compensated in damages resulting from a breach of the contract. *Ib.*

3. *Same.—Action for.—Triable by Jury.*—The action to quiet title was not one "of exclusive equity jurisdiction prior to the 18th day of June, 1852" (section 409, R. S. 1881), but is a statutory action triable by jury, as were all actions at law when the statute of 1881 went into force. *Martin* v. *Martin*, 118 Ind. 227, distinguished. *Ib.*

RAILROAD.

See COVENANT; MASTER AND SERVANT, 4; NEGLIGENCE, 2, 6, 12, 14, 16, 19; TRESPASS.

1. *Setting Out Fire on Right of Way.—Sufficiency of Complaint.*—For a complaint held sufficient in an action against a railroad company for burning plaintiff's property, see opinion. *Chicago, etc., R. R. Co.* v. *Williams*, 30

2. *Same.—Evidence.*—In such action the evidence tended to show that on the defendant's right of way, at the point where it was claimed the fire started, dry grass and weeds, both standing and cut, lying in swaths extended up close to the line of the rails; that passing locomotives frequently dropped coals of fire which sometimes set fire to the ties; that the weather was dry, and the wind was blowing in a direction which would carry fire toward the plaintiff's land, and that a line of fire extended from that point to plaintiff's land.

Held, that the evidence was sufficient to sustain a verdict for plaintiff. *Ib.*

3. *Same.—Negligence.—Proximate Cause.*—Where the evidence shows that other lands intervened between the right of way, where the fire originated and the plaintiff's land, over which said other lands the fire burned before reaching his land, and that it burned several days before it was finally subdued, being partially subdued several times, and again breaking out, defendant is not relieved from liability on the ground that its negligence was not the proximate cause of the injury. *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16, disapproved. *Ib.*

4. *Construction of.—Damages.—Right of Action.—When and to Whom it Accrues.—Does not Descend to Heir.—Answer.*—In an action against a railroad company for the assessment of damages occurring by reason of the construction of a railroad across the lands of the plaintiff, which lands she inherited from her father and mother, an answer is good which pleads facts showing that the cause of action accrued long prior to the institution of plaintiff's suit, in favor of the then owner of the lands, and that the right to recover the damage vested in him at that time. The right of action accrued at the time when the ancestor might have maintained an action for the damages or instituted proceedings to have had his damages assessed. This he could have done as soon as the grade was completed through the land connecting with and constituting one continuous road-bed for many miles on either side of the land as shown by the finding of facts. Such a right is a chose in action and does not descend to the heir as an incident to the real estate. *Harshbarger* v. *Midland R. W. Co.*, 177

5. *Same.—Evidence.—When Proper to Strike Out.*—In such an action it was not error for the court to strike out and take from the consideration of the jury certain evidence given on the trial with reference to the administration and settlement of the estate of plaintiff's father, the

complaint proceeding upon the theory that the plaintiff claimed the right to have the damages assessed on account of being the owner of the real estate, and not upon the theory that her father owned the land at the time the cause of action accrued, and that the chose in action descended to her because she was the only child. *Ib.*

6. *Complaint.—Contributory Negligence.—Demurrer.—Motion to Make More Specific.*—In an action to recover damages for personal injuries resulting in death, a general averment in the complaint that the party was without fault is sufficient, unless the facts specially pleaded clearly show that he was guilty of contributory negligence. Such an averment is sufficient to withstand a demurrer or a motion to make more specific. *Pennsylvania Co. v. McCormack, 250*

7. *Same.—Construction of Track.—Duty as to.—Co Employee.*—If a railroad company so negligently constructs its tracks and side tracks, that cars occupying the main line of its track can not pass cars occupying the adjacent side track without endangering the lives of the employees charged with the duty of moving such cars, its negligence is actionable If one of its employees is, by reason thereof, killed or injured while in the discharge of his duty, and is himself without fault, and using due care, such company is liable to respond in damages. It was the duty of the company to contemplate that sooner or later cars might have to pass each other at each and every point on the two tracks. It is no defence that those whose acts brought such cars into such dangerous proximity were co-employees with the one injured. *Ib.*

8. *Same.—Negligence.—Proof of Custom.*—It was proper for the plaintiff to show that it was customary to cut moving trains at the station where the decedent was killed. As bearing on the question of negligence and tending in some degree to show whether or not the decedent was negligent, it was competent to prove that he was or was not doing his work in the usual and customary way. *Ib.*

9. *Same.—Instructions to Jury.—Prefatory Statement.—Contributory Negligence.*—An instruction to the jury which fairly and tersely states all of the material facts necessary to be established by the plaintiff to entitle him to recover is not objectionable on the ground that the jury might fail to make the necessary connection between the prefatory statement, "If you shall find from the evidence," and the propositions that follow. The defendant can not complain of a clause in said instruction which informed the jury that to entitle the plaintiff to recover the intestate must have been "without any fault or negligence on his part." *Ib.*

10. *Personal Injuries.—Defective Appliance.—Knowledge of Company.—What Complaint Must Aver.*—In an action against a railroad company to recover damages for injuries resulting in the death of brakeman, which injuries it is averred in the complaint were caused by the defective condition of a brake-staff, it is essential, to authorize a recovery, that the plaintiff should allege and prove that the defect which caused the injury was known to the defendant, or was such as with reasonable diligence should have been discovered.
Chicago, etc., R. R. Co. v. Fry, 319

11. *Same.—Knowledge of Defect.—Special Findings.*—There can not be a recovery for the plaintiff in such an action, where the special findings of the jury not only do not state facts from which an inference of notice of the defect arises, but on the contrary states that upon inspections made at different times and places no defect was found in the brake-staff, and that such defects as existed could not have been discovered without taking the brake-staff off the car and striking it with a hammer. *Ib.*

12. *Same.—Defective Appliance on Foreign Car.—Inspection of by Defendant*

Company.—Where the car with the defective brake-staff did not belong to the defendant, but to another railroad company, and was only temporarily in use by the defendant, and came to it loaded, the fact that the car had been in the possession of the defendant for nearly two weeks prior to the accident, was not of itself sufficient to charge the defendant with notice of the defects. The inspection which a company is required to make of a foreign car, tendered it by another company for transportation over its lines, must be made with reasonable care, so as to furnish its employees with reasonably safe appliances for use in the discharge of their duties, but it can not be held liable for hidden defects which could not be detected by such an inspection as the exigencies of traffic will permit. *Ib.*

13. *Same.—Answer.—Ignorance of Defect by Defendant.*—A paragraph of answer was good as a special denial to the complaint, which averred that the car, with the defective brake, was a foreign car, etc., and that the defendant had no knowledge of the defect before the happening of the accident and could not have discovered it by careful examination. *Ib.*

14. *Same.—Answer.—Inspection of Appliances by Employees.—Rules of Company.—Reply.*—A paragraph of answer was filed to the complaint which set out a rule of the railroad company requiring its brakemen to examine and know for themselves that the brakes, ladders, etc., which they were to use were in proper condition, and if not to put them in condition, or report for repairs. It was further averred that the decedent had knowledge of this rule, but was negligent in failing to make an examination of the brake-staff and report it out of repair before the car left the point of starting on the trip on which he was injured. Ignorance of the defect on the part of the defendant was also averred.

Held, that while the above paragraph of answer was little more than a special denial of the complaint, it was not error to overrule a demurrer to the same.

Held, also, that a paragraph of reply to said paragraph of answer was good which showed that the deceased was not furnished with the appliances, nor had he the opportunity to make the inspection required by the rules of the company. *Ib.*

15. *Construction of.—Writ to Assess Damages.—Statute of Limitations.*—A petition for a writ to assess the damages occasioned by the construction of a railroad over the petitioners' lands, under the provisions of sections 905-912, R. S. 1881, is barred by the fifteen years' statute of limitations. *Shortle* v. *Terre Haute, etc., R. R. Co.*, 338

16. *Same.—Remainderman May Apply for Writ.—Intervening Life-Estate.—Statute of Limitations.*—A remainderman is entitled to apply for the writ, and the intervening life-estate is no barrier to the exercise of the right to have his damages assessed. The fact that there is an intervening life-estate will not prevent the statute of limitations from running. *Ib.*

17. *Same.—Conveyance of Right of Way.—Answer.*—An answer to such a petition which pleaded in bar to the entire application that some of the petitioners had conveyed the right of way, is bad on demurrer. The fact that some of the petitioners had conveyed the right of way is no bar to the right of those who had not done so, to have their damages assessed *Ib*

18. *Same.—Right of Way.—Agreement to Fence.—Answer.*—An answer to such a petition is bad which averred entry upon and occupancy of the right of way in controversy with the consent of the petitioner, and an agreement on the part of the petitioners to convey such right of way, in consideration of the railroad company's agreement to fence the

same, and compliance by the railroad company on its part. The duty to fence the road was a duty imposed upon the railroad company by law, and a promise to perform that duty was no consideration for an agreement on the part of the petitioners. *Ib.*

19. *Rate of Speed.*—A railway company may not run its trains in a populous city at the same rapid rate of speed it may in the country and escape liability on the ground that it may run such trains at any rate of speed it choose to do so.
Cleveland, etc., R. W. Co. v. Harrington, 426

20. *Same.—Ordinance Regulating the Speed of Trains, Validity of.*—An ordinance of a city requiring all trains within the limits to be run at a speed not over four miles an hour, if its enactment is authorized by a statute, is valid, and evidence will not be heard that such ordinance is unreasonable, and therefore void. *Ib.*

21. *Same.—Failure to Enforce Ordinance.*—A railway company violating an ordinance by running its trains at a rate faster than is allowed by the terms of such ordinance, can not set up as a defense that the officers and citizens of the city have never enforced such ordinance, although it has been enacted many years before. *Ib.*

22. *Same.—Person Approaching Track, When Should Look for Coming Trains*—The court will not undertake to say to the jury just how many feet from a railroad track a person approaching a crossing should look for approaching trains before attempting to cross such track, but will leave that question to the jury. *Ib.*

23. *Same.—Requirement of Person Approaching Crossing.*—All the law requires of a person about to cross a railroad track at a public highway, is to use ordinary care to avoid injury. *Ib.*

24. *Same.—Company Organized Under Special Charter.—No Right to Regulate Speed in Cities or Towns Reserved.*—The speed of the trains of a railway company organized under a special law of the State may be regulated by a municipal ordinance enacted in pursuance of a general statute, although no reservation to regulate the speed of such company's trains is inserted in such special charter. *Ib.*

25. *Contributory Negligence.—Reply.—Sufficiency of.*—Where a traveller in attempting to cross a railroad track looks in but one direction, from which he is expecting a train, and, in going upon said track, he is struck by a train coming from the opposite direction and is injured; and if, before entering upon said track, he could have looked in the opposite direction to a considerable distance along said track, and could have seen the approaching train which struck him, but failed to look in that direction, and is injured by said train, he is guilty of contributory negligence and can not recover.
Thornton v. Cleveland, etc., R. W. Co., 492

26. *Same.*—A traveller has no right to look for danger from a given point and then close his eyes and pass upon the track, and the failure of the company to give the proper signals is no excuse for his lack of diligence. *Ib.*

27. *Appropriation to Aid.—County Commissioners.—Change of Township Boundaries.—Transfer of Property Thereby.—Liability of for Appropriation.—Tax Levy.—Notice.*—The board of commissioners of a county, at the June session, 1882, ordered that a tax be levied upon all the taxable property within a certain township in said county, to aid in the construction of a proposed railroad, an election held in said township having resulted in favor of such an appropriation. At the time said tax was ordered to be levied, all of the appellant's property in said county was situated and assessed for taxes in a township which had voted against an appropriation for said railroad. The board of com-

missioners, in March, 1883, changed the boundaries of said township, and by such change the property of the appellant in said county was transferred to the township which had voted in favor of the appropriation.

Held, that the property of the appellant so transferred after the order for the levy was made, but before the tax was in fact levied, was liable for its proportion of the same.

Held, also, that no notice is required of the levying of a tax authorized or directed by law. *Lake Shore, etc., R. W. Co.* v. *Smith*, 512

28. *Same.—Appeal from Order of Board.*—An appeal from the order of a board of county commissioners levying a tax in aid of a railroad, goes to the circuit court for trial as an original cause, and vacates the order of the board and the judgment of the circuit court ordering the levy, which judgment was rendered after the change of boundaries, would make the appellant's property liable for its proportion of the tax. *Ib.*

29. *Same.—When Levy Should be Made.—Right to Make After Time Fixed.*—Though the law requires the levy to be made at the June session of the board of county commissioners next after the rate, the duty to make it is absolute, and the power to make it is not lost by a failure to exercise it at the right time. *Ib.*

30. *Crossing Highway.—Duty to Restore to Previous Condition.—Failure to do so.—Liability for Damages.*—It is the duty of a railroad company upon building its railroad across a highway, to restore the highway as nearly as possible to its previous condition, and failing to do so the company is liable for damages sustained on account of injuries received by reason of the unsafe condition in which it was left, provided the injured party used care commensurate with the apparent danger. *Louisville, etc., R. R. Co.* v. *Pritchard*, 564

REAL ESTATE.

1. *Conveyance.—Equitable Title.—Purchaser with Notice.—Execution Creditor.—When not bona fide Purchaser.*—A. executed a deed to B. for certain real estate on the 19th day of October, 1885. B thereafter sold the land to C. and delivered the deed he had received from A. to C.'s agent, and the same not having been recorded, was destroyed, and A. made a conveyance directly to C. Subsequently A. executed another deed to B., reciting as a reason for so doing the loss or destruction of the prior deed. C. afterward conveyed the land to D.

Held, that D. acquired a good title to the land as against an execution creditor whose claim rested upon a sheriff's sale made on a judgment rendered on the 26th day of February, 1886, against A. and others.

Held, also, that at the time the judgment was rendered, A. had no estate or interest in the land upon which the judgment could fasten, and that B. was the equitable owner of the land, if not the legal owner, and that against a prior equitable title a judgment can not prevail.

Held, also, that C. being a *bona fide* purchaser in all that the term implies, her grantee acquired title even if he purchased with notice.

Held, also, that an execution creditor who buys at his own sale is not a *bona fide* purchaser within the meaning of the law. *Old Nat'l Bank, etc.*, v. *Findley*, 225

2. *Same.—Statute of Frauds.—When Creditor can not Take Advantage of.*—A creditor can not take advantage of the statute of frauds to avoid a sale of lands made by the debtor, although the latter might have done so if he had elected. *Ib.*

3. *Same.—Conveyance to Defraud Creditors.—Innocent Grantee.—Protection of.—Presumption of Good Faith.*—If a conveyance is made with intent to defraud creditors, and the grantee does not participate in the

fraud, and pays a valuable consideration for the realty, his rights and the rights of his grantees are secure against such creditors. The presumption is in favor of good faith, and unless overcome makes a *prima facie* case. *Ib.*

4. *Same.—Voluntary Return of Deed.—Title not Revested.*—The voluntary return of a deed to the grantor for the avowed purpose of cancellation does not revest the grantee with title. *Speer* v. *Speer*, 7 Ind. 178, and *Thompson* v. *Thompson*, 9 Ind. 323, distinguished. *Ib.*

5. *Parol Promise to Convey.—Statute of Frauds.—Part Performance.—Consideration.*—The fact that the plaintiff agreed to take possession as part of the consideration for the promised conveyance, did not destroy the effect of possession as part performance, taking the case out of the statute of frauds. *Puterbaugh* v. *Puterbaugh*, 288

6. *Same.—Consideration of Affection.*—The fact that affection formed an element of the consideration does not impair the force of the contract. *Ib.*

7. *Same.—Special Verdict.—Possession as Tenant.*—The statement of the special verdict that relying on the contract with the deceased, and with his knowledge and consent, plaintiff and his wife entered into possession of the land in controversy, and had been in the peaceable, uninterrupted and exclusive possession thereof up to the death of the deceased and to the present time, excludes the inference that possession was taken as tenant, because it appears that it was taken under a contract for the conveyance of the land. *Ib.*

8. *Judgment for Possession of and for Damages.—Occupying Claimant.—Injunction.—Merger of Judgments.*—Proceedings under the occupying claimants' act are entirely independent of the principal action for the recovery of the land, except that they have the effect to stay the issuance of the writ of possession until the rights of the occupying claimant are determined and adjusted. After the occupying claimant's rights have been determined, the other party may pay the amount due him as such occupying claimant, and issue a writ for possession, and also an execution for the collection of his judgment, for the amount in each judgment is fixed independently of the other. *Hollingsworth* v. *Stumph*, 546

RECORDING.

See MECHANIC'S LIEN, 3.

REDEMPTION.

See MORTGAGE, 3, 4.

REFORMATION OF INSTRUMENT.

See MORTGAGE, 1.

RESCISSION OF CONTRACT.

See FRAUD, 1.

RES JUDICATA.

See FORMER ADJUDICATION.

RIGHT OF WAY.

See COVENANT; RAILROAD, 18.

SALE.

See DECEDENTS' ESTATES, 1; PARTNERSHIP, 4, 5.

SCHOOLS.

See SCHOOL DISTRICTS.

1. *Teacher.—Vote of District Not to Employ.—Enjoining Trustee Insisting on Employing Such Person.*—A trustee of a township has no power to em-

ploy any teacher for a school whom a majority of those entitled to vote at a school meeting of such school have decided, at any regular school meeting thereof, they do not wish employed; and the patrons of such school may, by injunction, prevent such trustee employing as teacher a person whom they have thus decided they do not desire.
O'Brien v. Moss, 99

2. *Same.—Appeal from Trustee to County Superintendent.—Finality of Decision.—Injunction* --The decision of a county school superintendent, on appeal from a trustee, that a certain person shall not be employed, over the protest of the patrons of a school district, is final and binding upon such trustee; and obedience thereto may be compelled by injunction. *Ib.*

3. *Same.—Refusal of Trustee to Decide.—Right of Appeal.*—The refusal of a trustee to decide a matter properly presented to him can not prevent the person asking a decision appealing the matter so submitted to him to the county school superintendent; for the refusal of the trustee to decide is a decision against the person who made the request for a decision. *Ib.*

4. *Same.—Construction of Statute, Rights of School Patrons.*—A statute declaring the right of taxpayers of a school district to declare who shall be the teacher of their children must be construed liberally so as to advance such right, and is not to be so construed as to hamper or destroy it. *Ib.*

SCHOOL TRUSTEE.

1. *Tax Levy for Special School Purposes.—Refusal of Auditor to Enter Levy — Mandamus.*—Where the trustee of a school township makes and files in the auditor's office of the county his annual tax levy for special school purposes, and the auditor refuses to make the assessment, or to enter a levy upon the duplicate, a mandamus proceeding to compel him to do so is properly brought in the name of the State on the relation of the school trustee. His duty does not end when he makes and reports the levy which the statute requires him to make and report, but continues until he has done what it is reasonable to do to recover the collection of the special tax levied by him.
Cole v. State, ex rel., 591

2. *Same.—Petition for Mandamus —Interest of Trustee Need Not be Averred.*—The petition in such a case need not specifically aver that the relator has a special interest in the performance of the duty which he asks the court to coerce the auditor to perform. Where the facts pleaded show the special interest, a specific allegation is unnecessary. *Ib.*

3. *Same.—Abuse of Discretion by.—Return to Writ of Mandate.—Insufficiency of.*—An averment in a paragraph of return to the alternative writ of mandate that the levy made by the board of county commissioners was sufficient for special purposes, and that there was no necessity for the levy made by the relator, adds no force to the return. The law invests the trustee with a discretionary power to determine, within the prescribed limits, the amount of the levy, and no other officer or officers can exercise that power. An abuse of that discretion must be shown before the courts will interfere. *Ib.*

4. *Same.—Pleading Custom.*—A paragraph of return to the alternative writ of mandate is bad which alleges that the defendant, in refusing to make the assessment, etc., was following a custom which had long prevailed in the auditor's office. The duties of the trustee and auditor are prescribed by law, and what the law prescribes custom can not affect. *Ib.*

5. *Same.—Levy for Special School Tax.—County Commissioners Need not Approve.*—The trustee of a school township is authorized by law to levy

a special school tax without the approval or concurrence of the board of county commissioners. Section 4467, R. S. 1881. *Ib.*

SET-OFF.

See PARTNERSHIP, 4.

SLANDER AND LIBEL.

1. *Evidence of Defendant's Pecuniary Condition.*—In actions for slander, evidence of the defendant's pecuniary condition is competent. *Fowler* v. *Wallace, 347*
2. *Same.* -In an action of slander or libel, for imputing the commission of a crime to the plaintiff, a plea of justification must be proved beyond a reasonable doubt. *Ib.*

SPECIAL FINDING.

See FRAUDULENT CONVEYANCE, 2; INSURANCE; RAILROAD, 11; VERDICT, 4.

1. *Evidentiary Facts.—Use of Word "Executed" in.*—Statements of evidentiary facts should not be inserted in a special finding, and will not be considered on appeal. For use of the word "executed," in a special finding, as applied to a deed, see opinion. *Smith* v. *James, 131*
2. *Same.—New Trial.—Assailing Conclusions of Law by.*—A motion for a new trial is proper where there is a special finding; but it is not a proper mode of assailing the correctness of the conclusions of law. *Ib.*
3. *When too Late to Request.*—After a general finding has been announced by the court, it is too late for a party to request the court to make a special finding. *Brundage* v. *Deschler, 174*
4. *Statement of Fact.—Exception to Conclusions of Law.— What it Admits.*—In a suit to recover the possession of land with damages for its detention, the court in its special finding of facts, after stating the reasonable rental value of the land for various periods, stated "that the damages accruing to the plaintiff by being kept out of the possession of said real estate from the date of said last demand to the time of the trial of this suit is the sum of two hundred dollars."

Held, that said final clause of the finding is a finding of fact, and not a conclusion of law.

Held, also, that an exception to the conclusions of law is an admission that the facts are fully and correctly found. *Blair* v. *Blair, 194*

5. *Can not be Amended After Judgment.*—A special finding can not be amended and defects in the same supplied on motion of one of the parties to a suit after the rendition of the judgment. *Hartlepp* v. *Whitely, Fasler & Kelly Co., 543*

SPECIAL LAW.

See CONSTITUTIONAL LAW, 5; NATURAL GAS, 3.

SPECIAL VERDICT.

See REAL ESTATE, 7; VERDICT, 2, 6.

STATUTE.

See ABATEMENT; CHANGE OF VENUE, 4; CONSTITUTIONAL LAW, 2; COUNTY SUPERINTENDENT, 2; DRAINAGE, 1, 6; ELECTIONS, 2, 4; EMINENT DOMAIN, 6; MARRIED WOMAN, 1; MECHANIC'S LIEN, 1, 4, 5; MUNICIPAL CORPORATIONS, 7; NATURAL GAS; NEW TRIAL, 2; PARTIES, 4; PRACTICE, 14, 15; QUIETING TITLE, 3; RAILROAD, 15; SCHOOL TRUSTEE, 5; TAXES, 3, 4, 6; TRESPASS.

STATUTE CONSTRUED.

See MORTGAGE, 2; SCHOOLS, 4; SURVEY.

STATUTE OF FRAUDS.

See REAL ESTATE, 2, 5.

STATUTE OF LIMITATIONS.

See ADMINISTRATOR'S SALE, 1; MARRIAGE CONTRACT, 2, 3; PLEADING, 15; RAILROAD, 15, 16; TRESPASS.

STAY OF PROCEEDINGS.

Petition for.—Necessary Averments.—Another Action Pending.—In an action for judgment on a note and for foreclosure of a mortgage, where there is a petition for a stay of proceedings, in so far as the foreclosure of the mortgage is concerned, until the final determination of a cause between the same parties then pending in the Supreme Court for the cancellation of the mortgage, the petition is addressed to the equity side of the court, and must affirmatively state facts showing a defence, and that such defence is properly pleaded and presented in the case on appeal, and that the other action is prosecuted in good faith, and with a reasonable prospect of success. *Horman* v. *Hartmetz, 558*

STENOGRAPHER'S REPORT.

See BILL OF EXCEPTIONS, 5, 6, 8.

STREET IMPROVEMENT.

See MUNICIPAL CORPORATIONS.

SUBROGATION.

See VENDOR AND VENDEE, 2.

SUMMONS.

Service of.—Return of Sheriff.—To what Credit Entitled.—The return of the sheriff endorsed on a summons, showing that it had been duly and regularly served, is evidence of a high grade, and abundantly sufficient of itself to sustain a finding and judgment of the court that there was proper service of the summons. *Murrer* v. *Security Co., 35*

SUPREME COURT.

See PRACTICE, 32.

Weight of Evidence.—Where there is some evidence upon every material question necessary to sustain the finding of the court, the same will not be disturbed on appeal. *Balue* v. *Sear, 301*

SURETYSHIP.

See HUSBAND AND WIFE, 1, 2; MARRIED WOMAN.

SURFACE WATER.

1. *Township Authorities Casting on Adjoining Land.—Injunction.*—A township can not collect water along a public highway therein, in an artificial channel, and then cause it to flow upon the adjoining lands of a private individual in a greatly increased quantity; and its officers may be enjoined, to prevent such flowage. *City of North Vernon* v. *Voegler*, 103 Ind 314, distinguished. *Patoka Tp.* v. *Hopkins, 142*
2. *Same.—Court Directing Place and Method of Constructing Township Drains.*—A court can not direct how or when drains shall be constructed by highway officers, for the control of that matter is committed to those officers, and not to the courts. *Ib.*

SURVEY.

Boundary Lines.—Evidence of.—Statute Construed. A survey made under the provisions of section 5955, R. S. 1881, is, during the period of three years thereafter, *prima facie* evidence of the corners and lines estab-

lished thereby, and after that time, no appeal having been taken, it becomes conclusive evidence of the same. *Sinn* v. *King, 183*

TAX COMMISSIONERS.

State Board.—Power to Punish for Contempt.—So much of the tax law of 1889, as attempts to confer upon the State Board of Tax Commissioners power to fine and imprison for contempt is unconstitutional. *Langenburg* v. *Decker, 471*

TAX DEED.

See TAXES, 4.

TAXES.

See SCHOOL TRUSTEE, 1, 5.

1. *Injunction.*—A tax-payer who asks that the collection of a tax assessment be enjoined must pay or tender the sum rightfully assessed. *Smith* v. *Rude Bros., etc., Co., 150*
2. *Same.—Notice.—Pleading.*—In an action by a corporation to enjoin the collection of a tax assessment, if the complaint contains no allegation that notice of the meeting of the board of equalization was not given, it will be presumed that notice was given according to law, and where it appears that the board was in session it will be presumed that it was organized and convened according to law. *Ib.*
3. *Same.—Valuation of Corporate Stock.—Notice.*—Sections 6357, 6358, R. S. 1881, provide that "the auditor shall annually, on the meeting of the county board of equalization, lay before said board the schedule and statement" required to be made and delivered to the assessor by corporations, and that the "board shall value and assess the capital stock."

Held, that this is sufficient notice to the corporation that its capital stock will be valued. The act of March 9th, 1889, does not apply to such a case. *Ib.*

4. *Same.—Quieting Title.—Tax Deed.—Description.*—In an action to quiet title by the holder of a tax deed, the provision of the act of 1881 (Elliott's Supp., section 2143), that if the plaintiff's title is invalid, the amount due shall be ascertained and the lien declared and foreclosed, applies as well to a defect in the description, as to any other defect in the steps necessary to pass a valid title, and proof of the misdescription may be made without special allegation of the misdescription. *Travellers' Ins. Co.* v. *Martin, 155*
5. *Same.—Imperfect Description of Land — Lien for Taxes not Defeated Thereby.*—While an imperfect description of the land in a tax deed will defeat the title, yet it will not defeat the lien, if the purchaser can show what property was intended to be taxed. *Ib.*
6. *Same —Interest.*—Where the State's lien for taxes has been transferred to the purchaser, and a deed has been issued, interest is computed at twenty per cent. per annum. Elliott's Supp, section 2143. *Ib.*
7. *Enjoining Collection of Taxes.—Part Valid.—Tender or Offer to Pay Must be Shown.*—Where the complaint shows that part of the taxes, the collection of which is sought to be enjoined, are valid, and there is no offer or tender to pay them, the complaint can not withstand a demurrer for want of facts. *Smith* v. *Union County, etc., Bank, 201*
8. *Change of Boundaries.—New Property.*—When the territorial boundary of a body politic, or corporation, is extended so as to include new and additional property, such property is thereby subjected to taxation in like manner, and to the same extent as the property previously included within the corporation, and this is so even though such

taxation be for the purpose of paying pre-existing debts of the corporation. *Lake Shore, etc., R. W. Co. v. Smith, 512*

TENANTS BY ENTIRETIES.

See HUSBAND AND WIFE, 1.

TENDER.

See LIEN; TAXES, 7.

TITLE.

See MORTGAGE, 6; REAL ESTATE, 4.

TOWNSHIP TRUSTEE.

1. *Officer of Civil and School Townships.—Liable in Same Action for Both Funds.*—A township trustee is an officer of both the civil and school township, and he gives but one bond for both, and is liable in the same action for funds due both, and can not be required to set out the funds of each in separate paragraphs. *Ross v. State, ex rel., 548*
2. *Same.—Conversion of Funds by.—Evidence.*—Where a township trustee, who is sued for money converted by him, offers to testify in his own behalf that he paid out a certain sum of money borrowed for the township, with which he failed to charge himself in payment of certain orders issued and outstanding at the time he entered upon his duties as trustee, such proffered testimony was properly excluded, there being no preliminary proof making such testimony proper, if admissible at all; for the law requires a trustee to make report of his proceedings accompanied with proper vouchers, and make settlements with the board of commissioners, and also to make a record of the same. *Ib.*

TRESPASS.

See RAILROAD, 15.

Tortious Entry upon Lands.—Statute of Limitations.—Change of Ownership.—Railroad.—An action for damages for a tortious entry upon lands by a railroad company must be brought within six years after the cause of action has accrued. The action will not lie where there has been a change of ownership since the original trespass, and suit was brought more than six years after the commission of the trespass, but less than six years after the defendant succeeded in ownership to the original trespasser. Section 292, R. S. 1881.
Pickett v. Toledo, etc., R. R. Co. 562

TRIAL.

See PRACTICE, 26.

TRIAL BY JURY.

See QUIETING TITLE, 3.

When Cause can not be Withdrawn from Jury.—After a cause has been submitted to the jury for trial, the evidence introduced, argument had, and the jury has retired for consideration, it is too late for the court to reconsider its ruling, and, without the consent of both parties, withdraw the cause from the jury and decide it on the evidence that had gone to the jury. *Hendry v. Crandall, 42*

TRUSTEE.

See CHATTEL MORTGAGE.

Beneficiary's Notice of Creation of Trust Fund.—It is not necessary that the beneficiary of a trust should have requested or have knowledge of the creation of the fund to enable him to maintain a suit therefor.
Plaut v. Storey, 46

VENDOR AND VENDEE.

See REAL ESTATE.

1. *Enforcing Lien of.—Insolvency of Vendee.*—A vendor's lien may be enforced without reference to the insolvency of the purchaser.
Stevens v. *Flannagan*, 122

2. *Assumption of Mortgage.—Subrogation.—Injunction.—Lien.—Decedents' Estates.*—Defendant's father conveyed to him part of a tract of land. The consideration for the conveyance was the assumption of and the agreement on the part of the defendant to pay certain mortgages on the whole tract. The balance of the tract went to the defendant's mother by will. The defendant failed to pay off the mortgages, and agreed with his mother if she would do so, by the execution of a new mortgage on her portion of the tract, that he would pay off the mortgage so to be executed by her. The mother fulfilled her part of the agreement and then died.
Held, that the claim of her estate against the defendant was one for purchase-money of his land, the mother having the right to be subrogated to the same rights as her husband would have had if he had paid the debt and that her administrator might maintain a suit to have it declared a lien on the defendant's land though the mortgage defendant agreed to pay was not yet due, and to enjoin the defendant from selling or encumbering said land, it being shown in the complaint that he had no other means with which to pay off said mortgage.
Wilson v. *Burgett*, 245

3. *Payment on Contract of Purchase.—Vendee's Lien.*—Where a vendee pays money to the vendor upon a contract for the conveyance of the land, and the latter can not or will not convey, the former may enforce a vendee's lien for the money paid upon the contract of purchase.
Coleman v. *Floyd*, 330

VENIRE DE NOVO.

See PRACTICE, 11, 18.

VERDICT.

See INSTRUCTIONS TO JURY, 3; INTERROGATORIES TO JURY, 1; NEGLIGENCE, 8 to 10.

1. *General.—Answers to Interrogatories.—Irreconcilable Conflict.*—All fair intendments will be made in favor of the general verdict, and answers to interrogatories can not prevail against it, unless they are in irreconcilable conflict with it. For analysis of evidence showing that there is not an irreconcilable conflict between the general verdict and answers to interrogatories, see opinion. *Chicago, etc., R. W. Co.* v. *Hedges*, 118 Ind. 5, distinguished. *Toledo, etc., R. R. Co.* v. *Adams*, 38

2. *Special.—When Sufficient.—Surplusage.*—A special verdict will be sustained if, after eliminating improper matters, it contains facts sufficient to sustain a judgment. *Reeves* v. *Grottendick*, 107

3. *Weight of Evidence.*—Where there is testimony which is susceptible of an interpretation that will sustain the verdict the same will not be disturbed. *Evansville, etc., R. R. Co.* v. *Talbot*, 221

4. *General.—Special Finding.*—If the special findings can, upon any reasonable hypothesis, be reconciled with the general verdict, the latter will control. The court is bound to make every reasonable presumption in favor of the general verdict, which, of necessity, involves a finding upon every material question in issue. The court can not presume anything in aid of the special findings, but is limited, so far as they are concerned, to the specific facts actually found.
Louisville, etc., R. R. Co. v. *Summers*, 241

5. *When will not be Disturbed.*—Where there is evidence tending to sustain the verdict on all material points, it will not be disturbed.
Pennsylvania Co. v. *McCormack*, 250

6. *Special.—Substance of Issues.*—If the special verdict states such facts as sustain the substance of the issues, it is sufficient. It is not necessary that matters should be proved precisely as pleaded.
Puterbaugh v. *Puterbaugh*, 288

WITNESS.

See PRACTICE, 14.

Competency of Mortgagee in Foreclosure Suit when Mortgagor is Dead.—In a suit to foreclose a mortgage, where the mortgagor is dead, the mortgagee is not a competent witness to any matter which occurred prior to the death of the mortgagor. *Holland* v. *Holland*, 196

WRITS AND PROCESS.

See SUMMONS.

WAIVER.

See LIFE INSURANCE, 2.

WORDS AND PHRASES.

See DEED, 2, 4, 6; SPECIAL FINDING, 1; WILL, 3, 4.

WILL.

1. *Making of by Person under Guardianship.*—The adjudication of mental unsoundness in proceedings for the appointment of a guardian for a person, while it conclusively establishes the fact of his inability to manage his estate, does not necessarily establish the existence of such unsoundness as would incapacitate him from making a valid will.
Harrison v. *Bishop*, 161

2. *Same.—Appointment of Guardian for Person.—Evidence of Mental Unsoundness.—Burden of Proof.*—It is, however, *prima facie* evidence of such want of mental power, and when the validity of a will is properly in question, if it is shown to have been executed by one under guardianship, the burden is upon those who seek to uphold it to show by clear, explicit and satisfactory evidence that at the time it was executed the maker had the requisite degree of mental capacity. *Ib.*

3. *Conditional Fee.—Meaning of Word "Heir."—Death of Child Divesting Estate.*—A testator bequeathed to his daughter a tract of land on the condition that if she should die, leaving no heirs to her, then the land was "to revert back to" the testator's "estate, and be divided equally among his" heirs, and the same was not to be sold or conveyed until after there "should be an heir born to the body of said daughter."
Held, that the word "heir" meant "child," that the will vested in the daughter a conditional fee in the land subject to become absolute upon the birth of a child to her; and that the death of such child before her death did not divest her of her estate in the land.
Held, also, that where a child was born to the devisee the condition ceased to exist, and that an absolute power of disposition and a limitation over are inconsistent with each other. *Essick* v. *Caple*, 207

4. *Fee Simple Estate.—The Word "Heirs" Construed.*—Where a will gave a certain share of the testator's real estate to his daughter, "M. R., and her heirs (exclusively)," she took a fee simple title to the real estate subject to be disposed of and conveyed by deed in which her husband should join. The word "heirs" in the will is used in its technical legal sense, and vests a fee in the first taker. *Reddick* v. *Lord*, 336

END OF VOLUME 131.